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Supreme Court, U.S.

F I L E D

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No. 96-663

*In the*  
**Supreme Court of the United States**  
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

*Petitioners,*

v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX - VOLUME I

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Petition for Certiorari filed October 24, 1996  
Certiorari granted January 10, 1997

192pp

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## TABLE OF CONTENTS

Page

Relevant Docket Entries for U. S. District Court . . . . .	1
General Docket for Eighth Circuit Court of Appeals included at A-1 in Respondents' Brief in Opposition to Petition for Writ of Cert.	
Opinion of Eighth Circuit Court of Appeals included at A-1 in Petition for Writ of Cert.	
Memorandum Opinion and Order of District Court included at B-1 in Petition for Writ of Cert.	
Amended Complaint, dated November 26, 1993 . . . . .	13
Defendant A.O. Smith Corporation Answer to Amended Complaint, dated January 24, 1994 . . . . .	73
Defendant A.O. Smith Harvestore Products, Inc. Answer to Plaintiff's Amended Complaint, dated January 25, 1994 . . . . .	94
RICO Case Statement of Marvin and Mary Klehr, dated February 11, 1994 . . . . .	114
Affidavit of William Olson, dated April 20, 1994 . . . . .	152
Affidavit of William Olson, dated May 31, 1994 . . . . .	161

	Page
Affidavit of Marvin Klehr, dated June 1, 1994 .....	171
Petition for Rehearing, dated June 17, 1996 .....	179

## VOLUME II

Deposition of Mary Klehr, dated February 10, 1993, (excerpt) .....	188
Deposition of Marvin Klehr, dated February 10-12, 17-18, 1993, (excerpt) .....	195
Deposition of Richard Deutsch, dated December 14, 1992, (excerpt) .....	458
Trial Testimony of George Marx, <u>Kronebusch v. M. BA. et al.</u> , No. 46952 (Dist. Ct. Minn., (excerpt) .....	476
Trial Testimony of William Johnson, <u>Kronebusch v. MVBA. et al.</u> , No. 46952 (Dist. Ct., Minn.), (excerpt), and attachment to correspondence, dated October 30, 1964 .....	484
Trial Testimony of W. W. Smith, Jr., <u>Saylor v. A. O. Smith Corporation, et al.</u> , No. CIV-4- 83-94 (Dist. Ct., Tenn.), (excerpt) .....	497
Trial Testimony of Donald Dunaway, <u>Pluemer v. AOSHPI, et al.</u> , No. 87-CV-0348 (Cir. Ct. Wis.), (excerpt) .....	502



<b>Order and Memorandum, <u>Kronebusch v. A. O. Smith/AOSHPI</u>, No. C78546952 (Dist. Ct. Minn. June 10, 1991)</b> .....	504
---	-----

<b>Affidavit of Karen E. Spors with Exhibits A-D and F, dated May 9, 1992</b> .....	528
---	-----

<b>Memorandum <u>First Nat'l Bank of Louisville v. Brooks Farms</u>, No. 2058 (S.D. Ohio November 2, 1988)</b> .....	617
--	-----

**U.S. DISTRICT COURT  
DISTRICT OF MINNESOTA (ST. PAUL)**

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**CIVIL DOCKET FOR CASE #: 94-CV-424**

**Klehr, et al v. A.O. Smith Corp, et al**

**Assigned to: Judge Michael J. Davis**

**Referred to: Magistrate Judge Franklin L. Noel**

**Filed: 08/27/93**

**Jury demand: Both**

**Nature of Suit: 470**

**Jurisdiction: Federal Question**

**Demand: \$0,000**

**Lead Docket: None**

**Docket # in other court: None**

**Cause: 18:1962 Racketeering (RICO) Act**

---

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**Docket as of February 15, 1995 1:48 pm**

Proceedings include all events.  
94-CV-424

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Docket as of February 15, 1995 1:48 pm

Proceedings include all events.  
94-CV-424

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Docket as of February 15, 1995 1:48 pm

Proceedings include all events.  
94-CV-424

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Docket as of February 15, 1995 1:48 pm

Proceedings include all events.  
94-CV-424

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and Severally**  
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**Frederick William Morris**  
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Docket as of February 15, 1995 1:48 pm



Proceedings include all events.  
94-CV-424

8/27/93 1 COMPLAINT - Summons issued.  
Assigned to Judge James M. Rosenbaum  
per Master list and referred to Magistrate  
Judge Franklin L. Noel (22 pgs) (dl)

8/27/93 2 DEMAND for jury trial by plaintiffs ( 2  
pgs) (dl)

11/29/93 54 AMENDED COMPLAINT [1-1] by  
plaintiff, jury demand (85 pgs) (jr) [Entry  
date 11/30/93]

1/25/94 74 ANSWER by defendant A O Smith Corp  
(19 pgs) (sh) [Entry date 01/26/94]

1/25/94 75 ANSWER by defendant A.O. Smith  
Harvestore to amended complaint (17  
pgs) (jr) [Entry date 01/26/94]

2/14/94 77 Rico Case Statement of Marvin and Mary  
Klehr (30 pgs + exhibits) (separate) (jr)  
[Edit date 02/14/94]

Docket as of February 15, 1995 1:48 pm

Proceedings include all events.  
94-CV-424

3/24/94 84 MOTION by A O Smith Harvestore for  
summary judgment ( to Judge James M.  
Rosenbaum ), Ret. 6/1/94 at 9:10 a.m. (2  
pgs) (sh)

4/8/94 85 Revised motion by defendant A O Smith  
Harvestore for summary judgment ( to  
Judge Michael J. Davis ) Ret. 6/29/94 at  
9:00 a.m. (2 pgs) (jr) [Entry date  
04/11/94]

4/25/94 91 AMENDED NOTICE OF MOTION by  
dft AO Smith Harvestore Products, Inc.  
for summary judgment ( to Judge Michael  
J. Davis ) on 6/15/94 at 9:00am. [85-1]  
(pk)

5/2/94 97 MEMORANDUM by plaintiffs in support  
of motion to amend the amended  
complaint. [96-1] 42 pages (ps) [Entry  
date 05/03/94]

5/2/94 98 AFFIDAVIT and EXHIBITS of Marvin  
Klehr. (6+ pages) --separate-- (ps) [Entry  
date 05/03/94]

Docket as of February 15, 1995 1:48 pm



Proceedings include all events.  
94-CV-424

5/2/94	99	AFFIDAVIT of William G. Olson. (10 pages) (ps) [Entry date 05/03/94]
5/2/94	100	AFFIDAVIT and EXHIBITS of Michael Behr. (10+ pages) (ps) [Entry date 05/03/94]
5/2/94	101	AFFIDAVIT and EXHIBITS of James A. Vick. (2+ pages) (ps) [Entry date 05/03/94]
5/2/94	102	AFFIDAVIT and EXHIBITS of Charles A. Bird. (4+ pages) --separate- - (ps) [Entry date 05/03/94]
5/9/94	112	MEMORANDUM by A O Smith Corp in opposition to motion to amend the amended complaint. [96-1] 2 pages (ps)
5/9/94	113	MEMORANDUM by A O Smith Harvestore in opposition to motion to amend the amended complaint. [96-1] 12 pages (ps)

Docket as of February 15, 1995 1:48 pm

Proceedings include all events.  
94-CV-424

5/9/94	114	AFFIDAVIT and EXHIBITS of Blake Shepard, Jr. regarding motion to amend the amended complaint. [96-1] 44 pages (ps)
5/9/94	115	AFFIDAVIT and EXHIBITS of Karen E. Spors. (62 pages) (ps)
5/18/94	120	MOTION by A O Smith Corp for summary judgment. ( to Judge Michael J. Davis ) ret. 6/15/94 at 9:00 a.m. (3 pages) (ps) [Entry date 05/19/94]
5/18/94	121	MEMORANDUM by A O Smith Harvestore in support of motion for summary judgment. [85-1] 26 pages (ps) [Entry date 05/19/94]
5/18/94	122	AFFIDAVIT and EXHIBITS of Blake Shepard, Jr. (2+ pages) --separate-- (ps) [Entry date 05/19/94]
6/6/94	125	MEMORANDUM by plaintiff in opposition to motion for summary judgment. [120-1] [85-1] 36 pages (ps)

Docket as of February 15, 1995 1:48 pm

Proceedings include all events.  
94-CV-424

6/6/94	126	AFFIDAVIT and EXHIBITS of William G. Olson regarding motion for summary judgment. [120-1] [85-1] 13 pages (ps)
6/6/94	127	AFFIDAVIT and EXHIBITS of Marvin Klehr regarding motion for summary judgment. [120-1] [85-1] 13 pages (ps)
6/6/94	128	AFFIDAVIT and EXHIBITS of James Anthony Vick regarding motion for summary judgment. [120-1] [85-1] 87 pages (ps)
6/6/94	129	AFFIDAVIT and EXHIBITS of Charles A. Bird regarding motion for summary judgment. [120-1] [85-1] 8+ pages (--separate- two expandables) (ps)
6/10/94	146	REPLY MEMORANDUM by A O Smith Harvestore in support of motion for summary judgment. [85-1] 10 pages (ps)
6/10/94	147	AFFIDAVIT and EXHIBITS of Blake Shephard, Jr. (16 pages) (ps)

Docket as of February 15, 1995 1:48 pm

Proceedings include all events.  
94-CV-424

6/15/94	150	MINUTES: ( Judge Michael J. Davis / Karen Grufman) taking under advisement deft's motion for summary judgment [120-1] 1 page (ps)
6/30/94	157	LETTER/EXHIBIT submitted by deft in support of motion for summary judgment. (15 pages) (ps)
7/1/94	159	LETTER/BRIEF by plaintiffs in opposition to motions for summary judgment. [120-1] [85-1] (ps)
1/6/95	212	MEMORANDUM, OPINION, AND ORDER: (Judge Michael J. Davis) granting defendants motion for summary judgment and plaintiffs' complaint is dismissed with prejudice termination notice (cc: all counsel) (24 pgs) (dl) [Entry date 01/09/95]
1/6/95	213	JUDGMENT entered (1 pg) (dl) [Entry date 01/09/95]

Docket as of February 15, 1995 1:48 pm

1/27/95 222 TRANSCRIPT of motion held 6/15/94  
before Judge Davis (Karen J. Grufman,  
reporter) - -separate- - (ps) [Entry date  
01/30/95]

2/2/95 223 NOTICE OF APPEAL by pltfs from  
Judge Michael J. Davis decision dtd  
1/6/95 [212-2] Receipt #119769 (pk)  
[Entry date 02/03/95]

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Docket as of February 15, 1995 1:48 pm

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No.: 4-93-822 (JMR)  
Jury trial demanded

Marvin Klehr and  
Mary Klehr,

Plaintiffs,

v.

A.O. Smith Corporation and  
A.O. Smith Harvestore Products,  
Inc., Jointly and Severally,

Defendants.

AMENDED COMPLAINT

---

Plaintiffs, Marvin and Mary Klehr, by and through their  
attorneys, as noted below, state the following as their claims  
in this matter:

1. Plaintiffs are adult residents of Scott County,  
Minnesota, and were dairy farmers in such county at all times  
relevant to this matter.

2. Defendant A.O. Smith Corporation ("AOS") is a  
Delaware Corporation whose principal place of business is in



Milwaukee, Wisconsin and doing business in the various states and the State of Minnesota and engaged in the business of designing, manufacturing, marketing and sales of various items of farm machinery and equipment, as well as other products, including, but not limited to, automobile frames and water heaters. AOS, in the late 1940's, researched, designed, patented, manufactured and marketed the Harvestore feed storage structure, and continued to do so exclusively until June, 1961, and in concert and combination with A.O. Smith Harvestore Products, Inc. thereafter.

3. Defendant A.O. Smith Harvestore Products, Inc. ("AOSHPT") is a Delaware Corporation, incorporated in June 1961 by AOS, whose principal place of business is in the State of Illinois doing business in various states and doing business in the State of Minnesota and is engaged in the business of designing, manufacturing, marketing and sales of various items of farm feed storage structures and related equipment, as well as other products, including, but not limited to Harvestore feed storage structures, slurry storage structures, feed conveyers, and water storage structures. AOSHPI is a wholly owned subsidiary of AOS.

4. Minnesota Valley Breeders Association ("MVBA") is a Minnesota Company doing business in the State of Minnesota and has been engaged in the business of selling, distributing, installing, assembling, servicing, repairing and modifying farm equipment and machinery and structures in its capacity as agent and representative for AOS and AOSHPI, as well as other products, including, but not limited to, semen for breeding cattle and livestock. MVBA was a member of Defendant's "Dealer Organization", comprised of exclusive dealers for retail sale of Defendants' farm products

and equipment. The Dealer Organization was created by Defendants. Dealer management, salesmen, and servicemen were required to attend education and training seminars scheduled by and conducted by Defendants. The Dealer Organization had a voice in sales of Harvestore silos through the "Dealer Advisory Board" and "Dealer Council".

### JURISDICTION

5. The amount in controversy in this action exceeds \$50,000.00 exclusive of interest and costs.

6. Jurisdiction of this action is grounded upon title 28 U.S.C. 1331, 28 U.S.C. 1332, and 18 U.S.C. 1961 et seq.

### GENERAL ALLEGATIONS

7. From 1949 to the present, AOS and AOSHPI have sold more than 75,000 Harvestore feed storage structures, thousands of which were sold after October 15, 1970.

8. In approximately July, 1973, Plaintiffs were contacted by a salesman of MVBA, Richard Deutsch, about purchasing a Harvestore feed storage structure ("Harvestore Structure" or "Harvestore Silo") and unloader that could be used to store medium moisture forage.

9. The Harvestore structure as described by the salesman was a 25 foot x 80 foot storage unit that the salesman recommended be used to store medium moisture alfalfa silage, which the salesman referred to as "haylage", a term coined by AOS.

[Paragraphs 10-11 included at G 1-12 in Pet. for Writ of Cert.]

12. These oral representations of Richard Deutsch as outlined in paragraph 11 were the same representations as contained in the Harvestore structure sales literature and films bearing the AOSHPI and AOS name and/or symbol as outlined in paragraph 10.

13. In justifiable reliance upon these material representations Plaintiffs purchased the Harvestore structure from MVBA on or about July 15, 1974. The purchase order was transmitted by MVBA to AOSHPI through the United States mail on or about this same date. AOSHPI, in turn, sent information about the sale, by U.S. Mail, to AOS, which maintained all warranty files and administered all claims regarding Harvestore silos.

14. In or about the spring of 1975, the Plaintiffs, for the first time, placed alfalfa into the Harvestore structure.

[Paragraphs 15-16 included at G 14-30 in Pet. for Writ of Cert.]

17. The material representations made in the sales literature, brochures, and films after the sale included that the Harvestore structure was oxygen limiting and would prevent oxygen from coming in contact with the feed and the spoilage resulting from exposure to oxygen, that the Harvestore structure stored feed like a fruit jar, the unloader door was designed to exclude air, and the structure was designed and was backed by AOS and its Research and Development Department. These material misrepresentations, after the sale,

including the representations and material omissions set out at Paragraphs 15, 16, and 26, fraudulently concealed from Plaintiffs any claim or cause of action based upon false statements made before the sale.

18. These material representations were the same as representations (a) contained in the Harvestore structure sales literature bearing the AOSHPI and AOS name and/or symbol and (b) the representations contained in the "Harvestore Farmer" magazine and "Harvestore System Farming" magazine the Plaintiffs received through the mail between 1972 and 1991, including the representation that the Harvestore structure would prevent oxygen from contacting the feed.

19. These material representations made before and after the sale were false.

20. Based on the material misrepresentations made, and upon which the Plaintiffs justifiably relied, the Plaintiffs believed they were dealing with a single company, AOS, which was backing the Dealer Organization in general, MVBA in particular, and the product.

21. Plaintiffs relied on the misrepresentations to their detriment after the sale in operating, using, and repairing the Harvestore structure from 1974 to 1991, and continued to suffer damages as a result.

22. In the years after commencing use of the Harvestore structure on Plaintiffs farm, the Plaintiffs dairy herd began to experience certain problems which were caused by the 25 x 80 Harvestore silo, including:



- (a) Erratic milk production, with a decline in milk production in relation to other dairy farmers.
- (b) Problems with herd health, reproduction, and body condition.

23. Plaintiffs made diligent efforts to discover the origin of the problems being experienced by their herd over the years, including, but not limited to the following:

- (a) Modifying the feed rations.
- (b) Periodic testing of the feed.
- (c) Changing feed companies.
- (d) Milking their herd more frequently.
- (e) Changing milking equipment.
- (f) Seeking advice from veterinarians and feed salesman and other experts.

24. Plaintiffs also advised MVBA of the problems being experienced by their herd.

25. AOS, AOSHPI, and MVBA both directly and indirectly, through literature and films advised Plaintiffs that any problem with feed in their Harvestore structure was related to their own management or a repairable problem with the silo. See paragraphs 10(a)(8), 15(a), 15(q), 16(a), 16(c), 16(d), 16(f), and 16(h) above.

[Paragraph 26 included at G 30-35 in Pet. for Writ of Cert.]

27. That such conduct and misrepresentations of Defendants as alleged herein was willful, malicious, and with a reckless disregard to the rights or safety of the Plaintiffs.

28. At all times relevant to this matter AOSHPI and AOS, separately and in concert, failed to advise and fraudulently concealed from the Plaintiffs and other farmers similarly situated that the problems that they were experiencing were related to the failure of the Harvestore structure to operate as an "oxygen limiting" feed storage structure, including those items specified at paragraph 26 herein.

29. That the Plaintiffs continued their attempts to solve their problems up until the spring of 1991 and neither suspected nor knew that the Harvestore structure was the cause of substantial and significant damage to their dairy herd and their farm.

30. In the spring of 1991, Plaintiffs read in the newspaper about potential defects in Harvestore silos, and subsequently began investigating the Harvestore structure as a cause of their herd problems and stopped using the Harvestore Silo at that time.

31. In the months and years after Plaintiffs stopped using the 25 x 80 Harvestore silo, Plaintiffs milk production increased dramatically and they became convinced that the Harvestore structure was responsible for their dairy herd problems. As a direct and proximate result of the Defendants' conduct, and by the use of the Harvestore silo on their farm,

Plaintiffs have suffered direct and consequential damages, including, but not limited to, loss of milk production, capital loss, Harvestore silo loss, and cow and calf losses in a sum not less than \$50,000.00.

**COUNT 1**  
**FRAUD - AOSHPI**

32. Plaintiffs incorporate by reference paragraphs 1 through 31.

33. During all times relevant to this matter MVBA salesmen were express, implied, representatives and agents of AOSHPI.

34. At all times relevant to this matter, MVBA was held out to the public and to the Plaintiffs as authorized representative and agent of AOSHPI.

35. During all times relevant to this matter, AOSHPI provided training to MVBA salesmen, including Richard Deutsch, regarding the sale of Harvestore structures.

36. This training included specifying to the salesmen, including Richard Deutsch, the representations that should be made to the prospective customers, including Plaintiffs, regarding the "oxygen limiting" features of the Harvestore structure.

37. The representations made by MVBA to the Plaintiffs regarding the Harvestore structure before the sale were the same representations AOSHPI instructed MVBA

salesmen to make to prospective purchasers, and included those representations set out at paragraphs 10 and 11 herein.

38. AOSHPI furnished to MVBA salesmen, including Richard Deutsch, sales literature regarding the Harvestore structure, which included, but was not limited to the materials identified in paragraphs 10, 11, 15, 16, 17, and 18. AOSHPI also directly furnished information to the Plaintiffs in the Harvestore Farmer magazine, Harvestore System Farming magazine, Hoard's Dairyman magazine, and other direct mailings, including the materials identified in paragraphs 10, 11, 15, 16.

39. AOSHPI instructed the Dealer Organization, MVBA, and MVBA salesmen to distribute the Harvestore structure sales literature to prospective purchasers.

40. Some of the Harvestore structure sales literature furnished by AOSHPI to MVBA was in fact, presented to the Plaintiffs, including the sales literature specified in paragraphs 10, 11, 15, 16, 17, and 18.

41. That Plaintiffs, as farmers, were a part of the class of persons that AOSHPI intended to influence by such literature, films, and promotional materials.

42. Representations made by AOSHPI to Plaintiffs in this sales literature both directly and through MVBA regarding the Harvestore structure and how it operates, including the representations at paragraphs 10, 11, 15, 16, 17, and 18 herein were material to Plaintiffs decision to purchase the Harvestore structure, as well as the continued use,



operation, maintenance, and repair of such structure after the sale, continuing to March 1991.

43. That these written, visual, and oral representations referred to in part in paragraphs 10, 11, 15, 16, 17, 18, 37, 38, 40, and 42 were false. In addition, AOSHPI failed to inform the Plaintiffs of material information which should have been given in light of the affirmative representations made, including but not limited to, that information outlined at paragraphs 26 and 28.

44. Through its conduct, AOSHPI assisted, instigated and participated in the false representations made by MVBA to the Plaintiffs, as well as fraudulently concealing the material omissions set out heretofore from the Dealer Organization, MVBA, and the Plaintiffs.

45. AOSHPI knew the representations it was making to the Plaintiffs directly, in advertising, and promotional material and through MVBA were false or were made recklessly, without any knowledge of the truth of those representations.

46. AOSHPI made those representations as part of their overall marketing program and expected and intended that Plaintiffs and others similarly situated would rely, and the Plaintiffs did rely upon these representations.

47. Unaware of the falsity of these representations, Plaintiffs justifiably relied upon the same to their detriment, in purchasing the silo, and in continuing to use it on their farm to store feed from which their livestock were fed until Spring 1991.

48. As a direct and proximate result of AOSHPI's misrepresentations, Plaintiffs have suffered severe, direct and consequential economic and non-economic damages, including those damages listed at paragraph 31.

49. AOSHPI's conduct was voluntary, intentional, malicious and so willful and wanton as to demonstrate a reckless disregard of Plaintiffs rights and safety.

## COUNT II FRAUD - AOS

50. Plaintiffs incorporate by reference paragraphs 1 through 49 herein.

51. During all times relevant to this matter, MVBA was held out to the public as an authorized representative of AOS.

52. During all times relevant to this matter AOS was directly involved in the research and development, marketing, financing, warranty programs, and distribution of replacement parts and advertising concerning the Harvestore structures such as the one purchased by the Plaintiffs.

53. During all times relevant to this matter, AOS was directly involved in approving the content of and distribution of Harvestore structure sales training materials, sales literature, films, and promotional material utilized by AOSHPI through its authorized dealers, including the sales literature, films, magazines, and promotional material furnished to Plaintiffs herein, including the material set out at paragraphs 10, 11, 15, 16, 17, and 18 herein.

54. The representations contained in the sales training materials, sales literature, films, magazines, and promotional material approved by AOS regarding the Harvestore structure and how it operated, including the representations at paragraphs 10, 11, 15, 16, 17, and 18 herein, were material to Plaintiffs decision to purchase the Harvestore structure, as well as the continued use, operation, maintenance, and repair of such structure, continuing until 1991.

55. That the representations made to the Plaintiffs, and referred to in the preceding paragraph were false. In addition, AOS failed to inform the Plaintiffs of material information which should have been given in light of the affirmative representations made, including but not limited to, that information outlined at paragraphs 26 and 28.

56. Through its conduct, AOS instigated, assisted, and participated in the false representations referred to herein and made by MVBA to the Plaintiffs, as well as fraudulently concealing the material omissions set out heretofore from the Dealer Organization, MVBA, and the Plaintiffs.

57. AOS knew the representations it was making to Plaintiffs through AOSHPI and MVBA were false or were being made recklessly, without knowledge of the truth or falsity of these representations.

58. AOS made these representations to Plaintiffs through AOSHPI and MVBA as part of their overall marketing program, and intended that Plaintiffs and others similarly situated rely on these material misrepresentations.

59. Unaware of the falsity, the Plaintiffs did, in fact, rely upon these representations to their detriment, in purchasing the silo, and in continuing to use it on their farm to store feed from which their livestock were fed until Spring 1991.

60. As a direct and proximate result of AOS's representations, Plaintiffs have suffered severe, direct and consequential economic and non-economic damages, including those damages listed at paragraph 31.

61. AOS's conduct was voluntary, malicious, and willful and wanton so as to demonstrate a reckless disregard of Plaintiffs' rights and safety.

### COUNT III RICO 1962(c) - AOS AND AOSHPI

62. Plaintiffs incorporate by reference 1 through 61.

63. In connection with the representations made by AOSHPI to Plaintiffs and prior to and after the sale of the Harvestore structure to Plaintiffs, MVBA, AOSHPI and AOS used the mails or caused the mails to be used on at least 25 occasions between June 1973 and March 1991 to transmit:

(a) Purchase orders for Harvestore structures from MVBA and other authorized dealerships to AOS and AOSHPI. In particular, on or about July 15, 1974, an "AOSHPI copy" of Plaintiffs purchase order for the 25 x 80 Harvestore silo was transmitted by U.S. Mail from MVBA to AOSHPI. This was one copy of a multi-copy form which used carbon paper to create additional copies. These purchase



order forms were standardized and approved by Defendants for use by the dealers. A copy of every purchase order for every silo sold by a Harvestore dealer was transmitted to AOSHPI and/or A.O. Smith by U.S. Mail, and/or by wire transfer of information (facsimile) in interstate commerce. AOSHPI would, in turn, confirm the order by return U.S. Mail and/or by wire transfer of information (facsimile). See Dealer Management Guide 710. AOSHPI then would provide, by mail, information to AOS on the sale for purposes of creating a warranty file, which was maintained and administered by AOS.

(b) Sales literature and sales aides between AOSHPI and MVBA and between AOSHPI and its other authorized Harvestore structure dealers, including the items listed at paragraphs 10, 11, 15, 16 and 63(f). See also Monthly Ad-itude, mailed to the Dealer Organization, including MVBA, periodically, beginning January 1974.

(c) Sales literature and/or sales aides between AOS and authorized Harvestore structure dealers, including the items listed at paragraphs 10, 11, 15, 16, and 63(t).

(d) Sales literature between AOS and AOSHPI, and between Defendants and advertising agencies and film production companies, including the items listed at paragraphs 10, 11, 15, 16, 63(f), and 63(h).

(e) Coupons requesting AOSHPI sales materials between farmers throughout the country and both AOS and AOSHPI, including the coupons listed at paragraphs 10, 11, 15, 16, 63(f), and 63(h).

(f) Sales literature between both AOS and AOSHPI and farmers throughout the country. In particular, the "Harvestore Farmer" and "Harvestore System Farming" magazine contained numerous solicitations for use of the U.S. Mails in regards to advertising materials concerning Harvestore silos. These magazines were sent to thousands of farmers through the use of AOSHPI's "electronic mailing list" on the dates indicated below. (See AOSHPI Dealer Management Guide 430.1 and 440.1). Defendants received coupons through the mail from farmers in response to these ads. Defendants sent to farmers advertising materials which contained false representations in the furtherance of the fraud, which included the following:

(1) Those Harvestore Farmer and Harvestore System Farming ads already set out at paragraphs 10, 11, 15 and 16 herein;

(2) Volume 4, number 2, (March-April, 1965) at page 4, appears a mail-in coupon for the book "Courage to Change". This book contains false statements at pages 59-60 regarding the breather valve (only operates in extreme conditions) and that the breather system provides oxygen free sealed storage.

(3) Volume 8, number 4 (Fall 1969) at page 15. The breather bags are depicted but no breather valve is shown and it is falsely stated that the pressure equalizing process practically eliminates oxygen contact with stored feed. At page 17 is a picture of a 25 x 80 Harvestore silo. A depiction of breather bags and no breather valve is shown. The advertisement states that the system compensates for gas pressure changes inside the structure by "breathing" air in and



out of the bags. It states that Harvestore silos are oxygen limiting.

(4) Volume 8, number 5 (Fall Special 1969) at page 16. Explaining the 25 x 80 Harvestore silo and making the same representations as in the immediately preceding subparagraph.

(5) Volume 9, number 2, (Winter Special, 1972) pages 22-23. There is a depiction of a 25 x 80 Harvestore silo and also the breather bags suspended from the Harvestore silo making the same representations as in the immediately preceding subparagraph.

(6) Volume 11, number 5 (September-October, 1972) at an advertising supplement on page 13 is a postage pre-paid post card addressed to AOSHPI to obtain information from the local dealer regarding Harvestore silos.

(7) Volume 11, number 6 (November-December, 1972) at page 1 is a postage paid mail card for the 1973 Buyer's Guide containing false information as referred to hereinabove at paragraph 10(a)(2).

(8) An article in Volume 12, (May-June, 1973) number 3, page 11, suggesting that the mails and telephones be used to obtain films from the Venard Film Library including the "Magic of the Harvestore Storage" referred to above at paragraph 10(b)(3). The mails and telephones were, in fact, used hundreds of times from 1970 to 1993, to arrange for use of Defendants' films regarding Harvestore silos by colleges, universities, schools, television stations and others, through the Venard Film Library.

(9) Volume 12, number 3 (May-June, 1973) at page 27, a mail in coupon for the brochure "You Can't Beat The System" referred to herein at paragraph 10(a)(10).

(10) Volume 13, number 1 (January-February, 1974) on back appears a solicitation for obtaining advertising information through the mails.

(11) Volume 13, number 2 (March-April, 1974) at page 27 are mail coupons for the purpose of expanding the mailing list of the "Harvestore Farmer" magazine and promising to send a free coffee mug by return mail. The "Harvestore Farmer" magazine was mailed to those farmers whose names were sent in and contains false statements as particularized in this paragraph and also at paragraphs 10(a) and 10(c). At pages 19 and 32 of this same issue are additional mail-in coupons. At page 6 of this issue is an article announcing a salesman training center. The mails were used for salesman in that the sessions were arranged by mail and training materials were sent by mail to the salesman before the training session.

(12) Volume 13, number 3 (May-June, 1974) at page 19. A mail-in coupon for information on Harvestore silos. At page 21 is a coupon for a "High Moisture Grain" brochure.

(13) Volume 13, number 4 (July-August, 1974) on the back cover solicits mail request for a "High Moisture Grain" brochure.

(14) Volume 14, number 1 (Spring, 1975) at pages 16-17 the reader is requested to "circle number 3" on a postage

paid return card for advertising information. At page 2 is a request to "circle number 1" on the postage paid return card.

(15) Volume 14, number 2 (Buyer's Guide Issue, 1975) between pages 16 and 17 are requests to "circle number 3" on the postage paid return card. (See Paragraph 15(a).)

(16) Volume 14, number 3 (Summer, 1975) at page 16 is an ad referring to "Oxygen Limiting" Harvestore storage and requesting the reader "circle number 1" on the postage paid return card. The next 2 pages solicit "circle number 3" on the same return card.

(17) Volume 14, number 4 (Fall, 1975) has a mail coupon for information on Harvestore silos. After page 15 is a mail coupon for the 1975 Buyers Guide which contains false statements as noted at Paragraph 15(a). Also before page 17 is an invitation to "circle number 3" on the postage paid return card.

(18) Volume 14, number 5 (Winter, 1975) has a mail in coupon for information on Harvestore silos.

(19) Volume 15, number 1 (January, 1976) has mail-in coupons on pages 2 and before page 18. It also has 2 requests, after page 16, to "circle number 3" on the postage paid return card.

(20) Volume 15, number 2 (March, 1976) has a mail in coupon for Harvestore silos, including the haylage booklet. (See Paragraph 16(f).) Also there are two requests, after page 16, to "circle number 3" on the postage paid return card.

(21) Volume 15, number 3 (June, 1976) has request after page 12, to "circle number 3" on the postage paid return card. (See Paragraph 15(b).)

(22) Volume 15, number 4 (September, 1976) has a mail coupon on pages 2, 7, 11, for information on Harvestore silos.

(23) Volume 15, number 5 (November, 1976) has a coupon at page 2 for more information on Harvestore silos. After page 16 are two requests to "circle number 3" on the postage paid return card for more information. At page 6, it states falsely that bottom unloading helps prevent oxygen from coming into contact with the feed. It also states that livestock receive warm feed even in the coldest weather without stating that the reason for warm feed is continued respiration/fermentation of the crop due to oxygen exposure through the unloader door and breather valve. At page 7 it states that A.O. Smith engineers were challenged with designing a method of unloading that did not allow the structure to fill with oxygen and that "bottom unloading" was the best solution to the problem. This is false in that bottom unloading is a major design problem allowing for the free access of air to the dome space.

(24) Volume 16, number 1, (February, 1977) after page 16 is a request to "circle number 3" on the attached postage paid return card in order to get more information from AOSHPI and/or the dealer.

(25) Volume 16, number 2, (April, 1977) after page 16 is a request to "circle number 3" on the attached postage paid



return card in order to get additional advertising information from AOSHPI and/or the dealer.

(26) Volume 16, number 5, (December 1977) after page 16 has a request to "circle number 3" on the attached postage paid return card in order to obtain further information relative to Harvestore silos. There is another coupon on the next page with the title "Yes, You Can" and request to mail the coupon to AOSHPI in order to get a free book. On the next page is a coupon which states "Yes, mail me information on the complete line of Harvestore system automation." This coupon is to be mailed to AOSHPI.

(27) Volume 17, number 2, (April 1978) has the quote "Yes, You Can" coupon referred to in the immediately preceding subparagraph. It also has, after page 16, a request to "circle number 3" on the attached postage paid return card, and also the coupon referred to in the immediately preceding subparagraph with the request "Yes, mail me information on the complete line of the Harvestore system automation."

(28) Volume 17, number 3, (June, 1978) on page 2 is a coupon to be mailed to AOSHPI requesting that additional information about Harvestore storage systems be returned by mail. At page 9, is another coupon to be mailed to AOSHPI stating "Yes, I am ready. Send me my free book." After page 16, is the request to "circle number 3" on the attached postage paid return card to obtain further information from AOSHPI regarding Harvestore silos.

(29) Pages 876 and 877 of the July 25, 1978 issue has an advertisement entitled "Break Out". This ad states that feed stored within a Harvestore corn unit is of higher quality

than other storage methods. It fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(30) Pages 1244 and 145 of the October 25, 1978 issue had an advertisement entitled "Cut Costs". This ad implies that the use of a Harvestore structure will result in higher net profits by increased production and reduction in money spent on money supplements. Fails to warn potential customers of inherent risks in using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(31) Volume 17, number 4 (October 1978) at page 14 it states that in conventional silos air can enter the structure and oxygen is the great enemy of moist feeds. It goes on to state that a Harvestore structure solves this problem through its combination of oxygen limiting construction, glass coating and bottom unloading. At page 15, there is a depiction of the breather bags with the sun and the moon without any depiction of a pressure relief valve. It states that the Harvestore structure breathes compensating for changes in air pressure while protecting feed from oxygen. It discusses A.O. Smith engineers designing the patented breather bag that has been a standard feature in every Harvestore since 1949. It goes on to state that the breather bag system allows the Harvestore structure to breathe without allowing air to come into contact with the feed. It states that the constant in and out breathing action compensates for normal fluctuations in atmospheric pressure. It does not allow fresh air to come into contact with stored feed. It states that excessive heating is prevented by the structures oxygen limiting environment. At

page 16, it states that the reason for warm feed in a Harvestore is the dark blue color of the structure and that the forage and grain comes out warm and appealing--far more palatable to livestock than the frozen popsicles that so often comes from conventional silos. It discusses oxygen limiting storage through the use of marine type access hatches that are "dogged down" to prevent air from entering. The "view point" at page 3 of this issue discusses the devotion to product improvement that is found in the history of A.O. Smith Corporation.

(32) Volume 17, number 4 (October 1978) has a coupon at page 2 requesting "Send me additional information about Harvestore storage systems and feeding equipment." It has a coupon at page 9 entitled "Yes, you can" and stating that "Yes, I am ready. Send my free book." At page 15, is an article that discusses A.O. Smith engineers. It states that breather bags provide a simple but effective system that allows the Harvestore structure to "breathe" without allowing air to come into contact with the feed. It goes on to state that the constant in and out breathing action of the breather bags compensates for normal fluctuations in atmospheric pressure, and yet it does not allow fresh air to come into contact with stored feed. It has a depiction of the top of a Harvestore silo with the sun and the moon and the caption for the picture which says "breather bags allow the Harvestore structure to "breathe", compensating for changes in air pressure while protecting feed from oxygen." The diagram does not have a depiction of the breather valve. At page 16, it states that the dark blue color of Harvestore causes forage and grain to come out warm and appealing--far more palatable to livestock than the frozen popsicles that so often come from conventional silos. This is false in that the significant reason for warm and

hot feed in a Harvestore silo, as known by the Defendants, is continued access of oxygen to the feed and continued fermentation and oxidation of the crop stored inside.

(33) Volume 17, number 5 has a mail in offer "Yes, You Can" at page 9. This contains the statement "Yes, I am ready. Send my free book." This same coupon appears between pages 16 and 17.

(34) Volume 18, number 4 (October 1979) has a mail in coupon on page 9 to obtain additional information about Harvestore storage systems and also has a toll free number 800-528-6050 ext. 656 in order to get additional information.

(35) Volume 18, number 5 at page 25 has the same coupon referred to in the immediately preceding subparagraph.

(36) Volume 19, number 2 (May 1980) at page 10 has a coupon for a book entitled "The Winning System". This book costs \$12.50 and is ordered by U.S. Mail through A.O. Smith Products Service Division, a division of A.O. Smith Corporation. The book is then sent back to the purchaser by U.S. Mail. The book contains misrepresentations relative to Harvestore silos. At pages 5-6 the book states that the Harvestore silo accommodates changes in pressure without allowing outside air to come into contact with the feed. There is a depiction of the top of a Harvestore silo on page 6 of the book which states the same thing but does not show air going in or out the pressure relief valve or through the unloader door. The book defines oxygen limiting at page 267, as "a feed storage system in which ensiled feeds are protected from the access of oxygen." At page 15 of the book it states that



the "real key to the Harvestore structure is the ability to limit oxygen is its patented breather bag system." It goes on to state "the purpose of the breather bags is to allow air to enter and exit the structure as it must compensate for changes in pressure--but without allowing it to come into contact with stored feeds." The breather system is defined at page 262 of the book, as "the system of valves, hoses, and breather bags that allows a Harvestore structure to compensate for changes in atmospheric pressure without allowing oxygen to come in contact with stored feeds." These representations are false. At Pages 252-254 of the book is a description of the Harvestore Dealer Organization. At Pages 244-247 of the book is a description of the Harvestore dealer salesman, the Harvestore Farmer magazine and films and literature that are "widely distributed to reach the greatest possible audience." This book was approved by AOS for content and was distributed and sold by AOS. There is a coupon on page 16 of the magazine to obtain a brochure "High Moisture Grains" which contains false statements about oxygen limiting Harvestore silos. On the back cover where there is a depiction of the Harvestore silo showing the air going in and out of the breather bags but not showing air coming in through the unloader or the pressure relief valve. It also states, falsely, that the unloader door is designed to exclude air.

(37) Volume 19, number 3 (July 1980) has a depiction of the top of the Harvestore silo showing air going in and out of the breather bags but not showing the pressure relief valve. The ad goes on to state that "breather bags allow the structure to compensate for daily temperature changes. As outside temperatures fall, the head space gases inside cool and contract, causing the air to enter the bags but not allowing the feed deteriorating oxygen to come into contact with the feed."

The ad also has a mail in coupon to obtain a brochure entitled "High Moisture Grains" which, on the back cover, has false representations concerning the oxygen limiting characteristics of the Harvestore silo.

(38) Volume 19, number 3, (July, 1980) at page 16 has a coupon to send to A.O. Smith Product Service Division in order to receive a copy of the book "The Winning System" by return mail. This is the same book referred to in subparagraph 63(f)(36). At page 25 of that same issue is another coupon for obtaining the brochure "High Moisture Grains" referred to in the immediately preceding subparagraph.

(39) Volume 19, number 4, (December, 1980) at page 2 is a mail in coupon in order to receive by return mail, the brochure entitled the "The Harvestore System". This brochure has misrepresentations regarding the Harvestore breather bag system on page 5, wherein it states that the Harvestore system needs to breathe too, "but its patented design prevents oxygen from coming into contact with the feed." (See Paragraph 16(g).) The back cover of this same magazine has a request that a reader send money in order to obtain the book "The Winning System" from A.O. Smith Products Service Division. This book was previously referred to above in paragraph 63(f)(36).

(40) Volume 20, number 2, (April, 1981) has a solicitation to obtain the book "The Winning System" from A.O. Smith Products Service Division. This book was previously referred to above in paragraph 63(f)(36).

(41) Volume 20, number 3, (June, 1981) the back cover has a solicitation for a copy of "The Winning System"



to be obtained from A.O. Smith Products Service Division. This book was referred to above in paragraph 63(f)(36).

(42) Volume 20, number 4, (August, 1981) at page 2 has a coupon to obtain the brochure "The Harvestore System" from AOSHPI. This brochure contains false statements regarding Harvestore silos as outlined above. The back cover has a solicitation to obtain a copy of "The Winning System" from A.O. Smith Products Service Division. This book was referred to above in paragraph 63(f)(36)

(43) Volume 20, number 5, (October, 1981) at page 2 has a mail in solicitation for the "Harvestore System" brochure at page 2 from AOSHPI. This is the same brochure as referred to above. The back cover has a solicitation for the book "The Winning System" from A.O. Smith Products Service Division. This book is referred to above in paragraph 63(f)(36).

(44) Volume, number 1 (February 1982) states on page 22 that A.O. Smith Harvestore has the "backing of a company known for quality since 1874." It also has a mail in coupon for the "Harvestore System" brochure. This brochure has misrepresentations concerning the oxygen limiting capabilities of the Harvestore structure on page 5.

(45) Volume 21, number 1 (February 1982) on the back cover has a solicitation for purchasing the book "The Winning System" from A.O. Smith Products Service Division. This book was referred to above at paragraph 63(f)(36).

(46) Volume 21, number 2, (April 1982) at page 2 has a mail in coupon for the brochure the "Harvestore System"

which contains false statements as noted above. On the back cover a solicitation for the book "The Winning System" from A.O. Smith Products Service Division. This book is referred to above at paragraph 63(f)(36).

(47) Volume 21, number 3 (June 1982) has a mail in coupon to obtain the brochure "High Moisture Grains" from AOSHPI. This brochure contains false statements as set out above. The back cover has a solicitation for obtaining a copy of the book "The Winning System" from A.O. Smith Products Service Division. This book was referred to above at paragraph 63(f)(36).

(48) Volume 21, number 4 (August 1982). It states in an article on page 17 that putting alfalfa haylage into a Harvestore "too dry" will not cause it to get hot and ruin the feed as long as the structure is properly managed and maintained. It goes on to state "that heating is caused by a reaction with oxygen, and the structures breather system will limit the access of air no matter what the moisture level of the feed." On page 15 of the same magazine is an advertisement indicating that Harvestore has the backing of a company known for quality since 1874 and has a mail in coupon for the "Harvestore System" brochure, to be received in the mail. (See Paragraph 16(g)).

(49) Volume 21, number 4, (August 1982) at page 4 has a solicitation to purchase the book "The Winning System" by filling out the return card at the center of the issue, which is to be stamped and mailed indicating that the farmer will get a copy and then will be billed for the book. See paragraph 63(f)(36). At page 15, is a mail in coupon to obtain the

"Harvestore System" brochure, which contains false statements as set out above. See Paragraph 16(g).

(50) Volume 21, number 5, (October 1982) at page 2 has a mail in coupon for "The Harvestore System" brochure, which contains false statements as set out above. The same coupon appears at pages 4 and 10 of the magazine. Page 9 has a solicitation to purchase the book "The Winning System" using the "attached post card." See paragraph 63(f)(36). Page 24 has a mail in coupon for the brochure "High Moisture Grains", which has false statements as set out above.

(51) Volume 22, number 1, (February, 1983) at page 4 has a mail in coupon for "The Harvestore System" brochure which has false statements as set out above. (See Paragraph 16(g)). This same coupon appears at page 24.

(52) Volume 22, number 3, (June, 1983) at page 15 has a mail in coupon for the "High Moisture Grain" brochure which has false statements as set out above. On page 22 is a mail in coupon for "The Harvestore System" brochure which has false statements as set out above. (See Paragraph 16(g)).

(53) Volume 22, number 4, (August 1983) has a mail in coupon for "The Harvestore System" brochure at page 22, which brochure contains false statements as set out above. (See Paragraph 16(g)).

(54) Volume 22, number 5 (October 1983) has a mail in coupon for "The Harvestore System" brochure which contains false statements as set out above. (See Paragraph 16(g)).

(55) Volume 23, number 2, (April, 1984) at page 16 is an ad that states "only A.O. Smith Harvestore can give you...the stability of a company known for quality since 1874."

(g) The "Harvestore Farmer" magazine and the "Harvestore System Farming" magazine between AOSHPI and Plaintiffs as well as other farmers throughout the country as outlined at paragraphs 10, 11, 15, 16 and 63(f).

(h) The mailing of fraudulent advertising to "Hoard's Dairyman" magazine, and the mailing of such magazine containing such fraudulent advertising by the publishers to the Plaintiffs and other farmers throughout the country.

(1) Those Hoards Dairyman ads already set out in paragraphs 10, 11, 15, and 16 herein.

(2) On page 81 of the January 25, 1970 issue there is an ad entitled "Profit Taker--Profit Maker." This ad compares stave silos with Harvestore and states that oxygen is more likely to get into the stave silo. It falsely states that oxidation burns much of the total nutrient value of feed stored in a stave silo and that the "oxygen-controlled Harvestore system" locks in more valuable protein and TDN. Ad also includes a coupon inviting the farmer to send for more information from AOSHPI.

(3) On page 215 of the February 25, 1970 issue there is an add entitled "Stalelated--Automated." This ad states that the Harvestore system "locks in" more valuable protein



and TDN. This ad contains a coupon inviting the farmer to send for additional written materials from AOSHPI explaining the benefits of using a Harvestore silo, including the free brochure "Forage--From Field to Feeding."

(4) On page 160 of the March 25, 1970 issue there is an ad entitled "Stalemated--Automated". This ad is identical to the ad identified in paragraph 63(h)(3).

(5) On page 279 of the April 10, 1970 issue there is an ad entitled "Stalemated--Automated." This ad is identical to the ad identified in paragraph 63(h)(3).

(6) On page 718 of the June 25, 1970 issue there is an ad entitled "Stalemated--Automated." This ad is identical to the ad identified in paragraph 63(h)(3).

(7) On page 786 of the July 25, 1970 issue there is an ad entitled "High or Dry?." This ad implies that the use of a high-moisture grain corn unit will result in more palatable feed, reduced storage losses and other advantages. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(8) On page 899 of the August 25, 1970 issue there is an ad entitled "High or Dry?." This ad is identical to the ad identified in paragraph 63(h)(7).

(9) On page 1255 of the December 10, 1970 issue there is an ad entitled "Where The Action Is! This ad claims that the Harvestore breather bags compensate for internal gas pressures, thereby keeping oxygen away from the stored feed.

This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(10) On page 89 of the January 25, 1971 issue there is an ad entitled "Introducing the New Mini." This ad implies that the use of a Harvestore will result in reduced storage losses. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(11) On page 121 of the February 10, 1971 issue there is an ad entitled "Protein--Why Purchase It When You Can Grow It". This ad implies that the use of a Harvestore will result in higher protein feed for cattle. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(12) On page 231 of the February 25, 1971 issue there is an ad entitled "Introducing the New Mini." This ad is identical to the ad identified in paragraph 63(h)(10).

(13) On page 451 of the April 10, 1971 issue there is an ad entitled "Protein--Why Purchase It When You Can Grow It." This ad is identical to the ad identified in paragraph 63(h)(11).

(14) On page 773 of the July 10, 1971 issue there is an ad entitled "Why Dry Corn?" This ad implies that the use of a Harvestore will result in highly nutritious and palatable feed. This ad contains a coupon encouraging the farmer to mail it in to receive additional information and a brochure entitled "High Moisture Grain" from AOSHPI.



(15) On page 851 of the August 10, 1971 issue there is an ad entitled "Why Dry Corn?." This ad is identical to the ad identified in paragraph 63(h)(14).

(16) On page 939 of the September 10, 1971 issue there is an ad entitled "Why Dry Corn?." This ad is identical to the ad identified in paragraph 63(h)(14).

(17) On page 94 of the January 25, 1972 issue there is an ad entitled "This Is Not a Silo!" This ad states that the internal breather system compensates for internal pressure changes. Also implies that AOSHPI has been in business for over 25 years. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(18) On page 252 of the January 25, 1972 issue there is an ad entitled "The Big Blue Feed Bank: It Breathes!" This ad states that the breather bag system is designed to keep air away from the stored feed. Also implies that AOSHPI has been in business for 25 years. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(19) On page 465 of the April 10, 1972 issue there is an ad entitled "This Bottom Unloader Is Old Enough To Vote. It's Never Had A Day Off." This ad implies that the Goliath unloader can operate for many years without problems. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(20) On page 1031 of the September 10, 1972 issue there is an ad entitled "Automatic First In/First Out For 25 Years". This ad implies that AOSHPI has been in business manufacturing Harvestores for 25 years. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(21) On page 1111 of the October 10, 1972 issue there is an ad entitled "Automated Feeding?." This ad states that, for 25 years, Harvestore has been a leading manufacturer of automated systems. Implies "Harvestore" and AOS Corporation are one and the same company. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(22) On page 71 of the January 10, 1973 issue there is an ad entitled "This Is Not a Silo". This ad is identical to the ad identified in 63(h)(17) above except title of free magazine is entitled Harvestore Farmer.

(23) On page 219 of the February 10, 1973 issue there is an ad entitled "Automatic First In/First Out for 26 Years". This ad states that you get better feed and that routine maintenance of the Goliath unloader is all that is necessary. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including the 1973 24-page buyers guide. (See paragraph 10(a) for outline of falsity in the 1973 Buyer's Guide).

(24) On page 223 of the February 25, 1973 issue there is an ad entitled "Automating Feeding Fact: One Call Can Do

It All". This ad implies that all Harvestore dealers are experts in feed storage automation systems. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "Feedlot Planning Guide".

(25) On page 629 of the May 10, 1973 issue there is an ad entitled "Expensive? Compared To What?." This ad implies that the use of a Harvestore results in higher quality feed and less storage losses. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "Forage--From Field to Feeding."

(26) On page 1137 of the September 25, 1973 issue there is an ad entitled "Harvestore Invents the 90-Day Month". This ad implies that the use of Harvestore high-moisture corn all but eliminates spoilage. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "You Can't Beat the System". (See paragraph 10(a)(10) for an outline of the falsity in "You Can't Beat the System.")

(27) On page 1325 of the November 10, 1973 issue there is an ad entitled "Automated Feeding Fact: One Call Can Do It All" This ad is identical to the ad identified in paragraph 63(h)(24).

(28) On page 105 of the January 25, 1974 issue there is an ad entitled "Twenty-five Years Ago It All Started With Just One". (See paragraph 10(a)(1)).

(29) On page 157 of the February 10, 1974 issue there is an ad entitled "The Sun Never Sets On the Harvestore System". This ad states Harvestores are used around the world, thereby implying a Harvestore will work as promised in any climate. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including booklet "explaining the unique advantages offered by the top-filling, bottom-unloading, oxygen limiting Harvestore System. (See also: paragraph 10(c)(5)).

(30) On page 1253 of the October 25, 1974 issue there is an ad entitled "Time To Change Your Labor Outlook?" This ad implies that the use of a Harvestore structure will be labor saving and will result in higher quality forage. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "You Can't Beat the System". (The latter brochure is discussed at paragraph 10(a)(10)).

(31) On page 1335 of the November 25, 1974 issue there is an ad entitled "So What's New In The Hay Baling Business?" This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "You Can't Beat the System". (See Paragraph 10(a)(10)).

(32) On page 1397 of the December 10, 1974 issue there is an ad entitled "Automated Feeding Fact: One Call Can Do It All". This ad is identical to the ad identified in paragraph 63(h)(24).

(33) On page 453 of the April 10, 1975 issue there is an ad entitled "A Harvestore System Gives You The



Opportunity To Have A Good Year, Every Year...In Spite Of The Weather." This ad implies that the use of Harvestores will result in higher quality feed. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(34) On page 711 of the June 10, 1975 issue there is an ad entitled "Weather Beater". This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a copy of the 1975 Harsestore Buyer's Guide. (See paragraph 15(a) for 1975 Buyer's Guide.)

(35) On page 775 of the July 10, 1975 there is an ad entitled "Energy Saver". This ad implies that a Harvestore will pay for itself in five years or less. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI regarding a booklet about the advantages of high moisture grain and a copy of the 1975 Harvestore Buyer's Guide. (See paragraph 15(a) for 1975 Buyer's Guide.)

(36) On page 871 of the July 25, 1975 issue there is an ad entitled "Feed Maker". This ad implies that the Harvestore silo turns forages into a carefully balanced livestock ration, as well as paying for itself in five years or less. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a copy of the 1975 Harvestore Buyer's Guide. (See paragraph 15(a) for 1975 Buyer's Guide.)

(37) On page 393 of the March 25, 1976 issue there is an ad entitled "Alfalfa and Harvestore...Great Together". This

ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including the Haylage Booklet. (See paragraph 16(f) for Haylage Brochure.)

(38) On page 539 of the April 25, 1976 issue there is an ad entitled "If You're Milking 35 Cows or More, It's Time to Take a Close Look at Harvestore". This ad implies that owning a Harvestore will pay for itself. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(39) On page 539 of the April 25, 1976 issue there is an ad entitled "Forage and Harvestore...Great Together!" This ad implies that owning a Harvestore will pay for itself. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a copy of the Forage Booklet.

(40) On page 605 of the May 10, 1976 issue there is an ad entitled "A Word About Haylage From the People Who Invented It." This ad states that Harvestore limited oxygen storage processes haylage through mild, controlled fermentation to make it highly palatable and digestible. Implies that Harvestore feed is like pasturing livestock year-round. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a copy of the Haylage Booklet. (See paragraph 16(f) for Haylage Booklet).

(41) On page 715 of the June 10, 1976 issue there is an ad entitled "Corn and Harvestore...Made for Each Other". This ad states Harvestore limited oxygen processing keeps out



excess oxygen while allowing mild, controlled fermentation. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(42) On the back cover of the July 10, 1976 issue there is an ad entitled "Harvestore Plus High Moisture Corn Equals More Milk Per Acre". This ad implies that the use of a Harvestore will result in higher profits. Fails to inform the buyer of the potential risk of spoilage. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(43) On page 873 of the July 25, 1976 issue there is an ad entitled "Corn and Harvestore...Made For Each Other". This ad is identical to the ad identified in paragraph 63(h)(41).

(44) On page 727 of the January 10, 1977 issue there is an ad entitled "Make Milk With The Water You Are Drying Out Of Your Corn". This ad implies that a Harvestore silo can pay for itself without advising the potential customer of the risks of using the structure.

(45) On page 215 of the February 25, 1977 issue there is an ad entitled "You Can Pay For a Harvestore With the Money Harvestore Saves You". This ad implies that using a Harvestore structure will result in higher net profits and fails to warn potential customer of inherent risks in using a Harvestore structure.

(46) On page 476 of the April 10, 1977 issue there is an ad entitled "You Can Pay For a Harvestore With the Money Harvestore Saves You." This ad is identical to the ad identified in paragraph 63(h)(45).

(47) On page 2 of the June 25, 1977 issue there is an ad entitled "Make Milk With the 15% of Your Feed Supply a Concrete Silo Wastes". This ad states that use of a Harvestore results in less spoilage than other types of storage systems. Fails to warn potential users of the risks in using Harvestore structures.

(48) On the back cover of the July 10, 1977 issue there is an ad entitled "Make Milk With the 15% of Your Feed Supply a Concrete Silo Wastes". This ad is identical to the ad identified in paragraph 63(h)(47).

(49) On page 879 of the July 25, 1977 issue there is an ad entitled "Make Milk With The Water You Are Drying Out Of Your Corn." This ad is identical to the ad identified in paragraph 63(h)(44).

(50) On the back cover of the August 10, 1977 issue there is an ad entitled "Make Milk With The Water You Are Drying Out Of Your Corn". This ad is identical to the ad identified in paragraph 63(h)(44).

(51) On pages 194 and 195 of the February 10, 1978 issue there is an ad entitled "Cut Costs". This ad implies that the use of a Harvestore structure will result in higher net profits by increased production and reduction in money spent on money supplements. Fails to warn potential customers of inherent risks in using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free book about haylage. (See paragraph 16(f) for Haylage brochure.)

(52) On page 745 of the March 25, 1978 issue there is an ad entitled "When Waiting Costs More Than Time... You're Ready". This ad states that field losses are prevented by the use of a Harvestore structure and that animals eat more corn if stored in a Harvestore structure and produce more milk. It states that Harvestore silos can pay for itself by producing more pork, beef or milk from every acre with less labor. It fails to warn potential customers of inherent risks of using Harvestore silos (See Paragraph 26). This ad also contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(53) On page 501 of the April 10, 1978 issue there is an ad entitled "Expand Up." This ad implies that the use of Harvestore forage will allow a farmer to milk more cows on the same amount of land by increased efficiency and quality of feed. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free book about haylage. (See paragraph 16(f) for Haylage brochure).

(54) On page 745 of the March 25, 1978 issue there is an ad entitled "When Waiting Costs More Than Time... You're Ready". This ad is identical to the ad identified in paragraph 63(h)(52).

(55) On the back cover of the July 10, 1978 issue there is an ad entitled "If You're Not looking Forward to Another Winter of Chopping Frozen Silage... You're Ready". This ad implies that the use of a Harvestore system reduces storage losses. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon

encouraging the farmer to mail it in to receive additional information from AOSHPI.

(56) On pages 876 and 877 of the July 25, 1978 issue there is an ad entitled "Break Out". This ad states that feed stored within a Harvestore corn unit is of higher quality than other storage methods. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free book about haylage.

(57) On pages 1244 and 1245 of the October 25, 1978 issue there is an ad entitled "Cut Costs". This ad is identical to the ad identified in paragraph 63(h)(51).

(58) On pages 158 and 159 of the February 10, 1979 issue there is an ad entitled "Here's Why First-In, First-Out Feeding Is Best For You And Your Livestock". This ad implies that the unloader system is built to require minimum maintenance. Also implies that the product line of Harvestore has improved over the last 30 years, each year, thus confusing and distinction between AOS and AOSHPI. Fails to warn potential customers of inherent risks of using Harvestore silos. Includes toll-free number to obtain additional information on Harvestore silos.

(59) On page 350 and 351 of the March 10, 1979 issue there is an ad entitled "Some Folks Say It Takes 60 Cows To Make a Harvestore System Pay. Don't Believe It". This ad states that air does not touch the feed stored within a Harvestore silo due to the breather bag system and demonstrates this point with a diagram. Fails to warn



potential customers of inherent risks of using Harvestore silos. Includes toll-free number for additional information on Harvestore silos.

(60) On page 666 and 667 of the May 10, 1979 issue there is an ad entitled "36,000 Farmers Will Do Less Hard Work Today Than You Do." This ad states that a Harvestore system controls oxygen to prevent excessive storage losses. Fails to advise farmers of risk of loss of feed arising out of push button unloading, as well as significant expenses associated with maintenance of the silo and unloader, the latter being work that must be paid for because the farmer can't do it himself. States that expansion of herds can be done because a Harvestore owner can get more feed from every acre because the feed quality is better. Implies that AOSHPI has been building Harvestores for 30 years and they have been improved each of those years, thus confusing the AOS/AOSHPI relationship. Fails to warn potential customers of inherent risks of using Harvestore silos. Includes toll-free number for additional information on Harvestore silos.

(61) On page 954 and 955 of the July 25, 1979 there is an ad entitled "There's Only One Way To Escape The High Cost of Drying Grain. Don't Dry It". This ad states that air does not touch the feed stored within a Harvestore silo due to the breather bag system and demonstrates this point with a diagram that doesn't show the pressure relief valve allowing outside air to directly contact the feed. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes toll-free number for more information on Harvestore silos.

(62) On page 854 and 855 of the July 25, 1979 issue there is an ad entitled "Five Reasons Why Cornlage Is Better Than Corn Silage". This ad states air does not touch feed stored within a Harvestore silo due to breather bag system and demonstrates this point with a diagram. Fails to warn potential customers of inherent risks of using Harvestore silos. Includes toll-free number for additional information on Harvestore silos.

(63) On page 1150 and 1151 of the September 10, 1979 issue there is an ad entitled "Here's Why First-In, First-Out Feeding Is Best For You And Your Livestock". This ad is identical to the ad identified in 63(h)(58) above. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes toll-free number.

(64) On pages 1492 and 1493 of the November 25, 1979 issue there is an ad entitled "You're Probably Paying For a Harvestore System. Why Don't You Own One?" This ad states that air does not touch the feed stored within a Harvestore silo due to the breather bag system and demonstrates this point with a diagram that doesn't show the pressure relief valve allowing outside air to directly contact the feed. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes toll-free number for more information on Harvestore silos.

(65) On page 1554 of the December 10, 1979 issue there is an ad entitled "Some Folks Say It Takes 60 Cows To Make a Harvestore System Pay. Don't Believe It". This ad is



identical to the ad identified in (63(h)(59) above. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes toll-free number for more information on Harvestore silos.

(66) On page 1555 of the December 25, 1979 issue there is an ad entitled "Some Folks Say It Takes 60 Cows to Make a Harvestore System Pay. Don't Believe It". This ad is identical to the ad identified in (63(h)(59) above. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes a toll-free number for more information on Harvestore silos.

(67) On page 737 of the May 10, 1980 issue there is an ad entitled "Finicky Eaters? Not With Harvestore System Haylage". This ad states that the breather bag system prevents oxygen from coming into contact with the feed and demonstrates this with a diagram. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including booklet "Harvestore System Haylage".

(68) On page 1082 of the August 10, 1980 issue there is an ad entitled "Cornlage is Better Than Corn Silage." This ad states that Harvestore silos control excess spoilage by limiting oxygen. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including booklet entitled "Cornlage."

(69) On page 1174 of the September 10, 1980 issue there is an ad entitled "Cornlage is Better Than Corn Silage". This ad is identical to the ad identified in paragraph 63(h)(68).

(70) On page 1371 of the October 10, 1980 issue there is an ad entitled "Finicky Eaters? Not With Harvestore System Haylage". This ad is identical to the ad identified in paragraph 63(h)(67).

(71) On page 1504 of the November 10, 1980 issue there is an ad entitled "Finicky Eaters? Not With Harvestore System Haylage". This ad is identical to the ad identified in paragraph 63(h)(67).

(72) On page 24 and 25 of the January 10, 1981 issue there is an ad entitled "I Feed More of What I Grow, and I Don't Work As Hard". This ad implies that use of a Harvestore structure will result in more feed out of every acre by reducing storage losses and more production out of every animal. This ad also falsely implies that higher-quality feed comes from forages stored in a Harvestore. Fails to warn potential customers of inherent risks of using Harvestore silos.

(73) On page 376 and 377 of the March 10, 1981 issue there is an ad entitled "We Don't Buy Feed, We Worry Less About The Weather, and Our Milk Production's Up." This ad implies that use of a Harvestore structure will result in more feed out of every acre by reducing storage losses and more production out of every animal. This ad also falsely implies that higher-quality feed comes from forages stored in a Harvestore. Fails to warn potential customers of inherent risks of using Harvestore silos.

(74) On page 940 and 941 of the July 10, 1981 issue there is an ad entitled "I Don't Pay to Dry Corn, I Go Directly From Field to Storage, and My Cows Never Had Better Feed". This ad implies that use of a Harvestore structure will result in more feed out of every acre by reducing storage losses and more production out of every animal. This ad also falsely implies that higher-quality feed comes from forages stored in a Harvestore. Fails to warn potential customers of inherent risks of using Harvestore silos.

(75) On page 1322 and 1323 of the October 10, 1981 issue there is an ad entitled "We Don't Buy Feed, We Worry Less About The Weather, and Our Milk Production's Up". This ad is identical to the ad identified in paragraph 63(h)(73).

(76) On page 40 and 41 of the January 10, 1982 issue there is an ad entitled "Get a Complete Harvestore System That's Right for You". This ad states that AOSHPI originated bottom unloading when Harry Truman was in the White House, when, in fact, AOSHPI was not created by AOS until 1961. Fails to warn potential customers of inherent risks of using Harvestore silos.

(77) On page 217 of the February 10, 1982 issue there is an ad entitled "We Don't Buy Feed, We Worry Less About The Weather, and Our Milk Production's Up. That's Why". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including the booklet entitled "The Harvestore System". (See paragraph 16(g) for the Harvestore System Brochure).

(78) On page 391 of the March 10, 1982 issue there is an ad entitled "How To Produce More Milk From Your Acres". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including the booklet "The Harvestore System". (See paragraph 16(g) for the Harvestore System Brochure).

(79) On page 703 of the May 10, 1982 issue there is an ad entitled "How To Produce More Milk From Your Acres". This ad is identical to the ad identified in paragraph 63(h)(78).

(80) On page 792 of the June 10, 1982 issue there is an ad entitled "Here Today, Here Tomorrow". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free booklet entitled "The Harvestore System". (See paragraph 16(g) for the Harvestore System Brochure).

(81) On page 974 of the August 10, 1982 issue there is an ad entitled "How To Produce Milk At less Cost". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including free booklet entitled "The Harvestore System". (See paragraph 16(g) for the Harvestore System Brochure).



(82) On page 1079 of the August 25, 1982 issue there is an ad entitled "How To Produce Milk At Less Cost". This ad is identical to the ad identified in paragraph 63(h)(81).

(83) On page 1383 of the October 25, 1982 issue there is an ad entitled "Here Today, Here Tomorrow". This ad is identical to the ad identified in paragraph 63(h)(80).

(84) On page 999 of the August 10, 1983 issue there is an ad entitled "High Moisture Gains". This ad implies that forage stored in a Harvestore system results in higher-quality feed. Fails to warn potential customers of inherent risks of using Harvestore silos.

(85) On page 78 of the January 25, 1984 issue there is an ad entitled "Your Decision is His Future". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos.

(86) On page 407 of the March 25, 1984 issue there is an ad entitled "It Wasn't a Question of Cost. It Was A Matter of Profit". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. (See paragraph 15(aa).)

(87) On page 771 of the June 25, 1984 issue there is an ad entitled "Your Decision is His Future". This ad is identical to the ad identified in paragraph 63(h)(85).

(88) On page 850 of the July 25, 1984 issue there is an ad entitled "It Wasn't a Question of Cost. It Was A Matter of

Profit". This ad is identical to the ad identified in paragraph 63(h)(86).

(89) On page 1124 of the October 25, 1985 issue there is an ad entitled "Here's How We're Working Today...for a More Efficient Tomorrow!" This ad states that various changes in the design of the Harvestore structure have made in better. Fails to warn potential customers of inherent risks of using Harvestore Silos.

(i) Information regarding the owners list, warranty program, and repair pacts between AOS and authorized Harvestore structure dealers and between AOS and Dave Brown & Associates;

(j) Dealer training manuals between AOSHPI, MVBA and between AOS and AOSHPI;

(k) Interoffice memoranda between AOSHPI and AOS, including those memoranda referred to at paragraph 26 above;

(l) Research and development reports between AOSHPI and AOS, including those reports referred at paragraph 26 above;

(m) Movies and films, including those referred to at paragraph 10, between Defendants and MVBA, between Defendants and other dealers, between Defendants and Venard Film Library, and between Venard Film Library and television



stations, and/or schools, colleges, and universities across the country.

64. Each of these transmittals by mail related to:

(a) Materials that were used to execute or in furtherance of the scheme to sell Harvestore structures through fraudulent representations made to Plaintiffs and farmers throughout the country by AOS and AOSHPI; or

(b) Materials that demonstrated the falsity of the representations made by AOS and AOSHPI to Plaintiffs and farmers throughout the country; or

(c) Materials that demonstrated the scheme to conceal known product defects from Plaintiffs, other farmers throughout the country, and from MVBA and the Dealer Organization.

65. Each use by MVBA, AOSHPI, and AOS of the United States mails to transmit this information constituted an act of mail fraud within the meaning of 18 U.S.C. § 1961(1)(b).

66. In connection with the representations made by AOS and AOSHPI to Plaintiffs prior to and after the sale of the Harvestore structure to Plaintiffs, MVBA, AOSHPI and AOS used the interstate telephone lines or caused the interstate telephone lines to be used on at least 25 occasions between June 1973 and March 1991 to transmit information regarding:

(a) Sales literature and/or sales aides furnished by either and/or both AOS and AOSHPI to Plaintiffs, farmers throughout the country, MVBA and other authorized dealers concerning the "oxygen limiting" capabilities of the Harvestore structure, including the items referred to at paragraph 10. In particular, established telephone numbers for the use of farmers, dealers, and salesmen, such as the "Harvestore Blue Hot-Line-312-439-1530" (See Harvestore Farmer, Vol 11, number 1, January-February 1972, page 9); 800-528-6050 ext. 656 Harvestore System Farming Magazine, Vol. 18, number 1 (February 1979), p. 25; Vol. 18, number 2 (April 1979) p. 25; Vol. 18, number 3 (June 1979) page 9; Vol. 18, number 4 (October 1979) p. 9; Vol. 18, number 5 (December 1979) p. 25; 815-756-1551 Vol. 26, number 2 (Fall 1987) p. 13; Vol. 27, number 2 (Fall 1988) p. 11; Vol. 28, number 2 (Fall 1979) p. 12.

(b) Interoffice memoranda generated by AOSHPI and AOS concerning the performance of the Harvestore structures and specifically its "oxygen limiting" capabilities, including the memoranda referred to as paragraph 26.

(c) Research and development reports generated by AOSHPI and AOS concerning the performance of the Harvestore structure and specifically its "oxygen limiting" capabilities, including the memoranda referred to at paragraph 26.

(d) Information regarding sales transactions, between Defendants, MVBA and other authorized dealers including copies of orders for Harvestore silos. (See Dealer Management Guide 710).

(e) Films between Defendants and Venard Film Library, and information regarding borrowing films, including Magic of Harvestore Storage, regarding Harvestore silos between Venard Film Library and colleges, schools, universities and television stations from 1970 to 1993.

67. Each of these transmittals by wire related to:

(a) Information that was used to execute or further fraudulent representations made to Plaintiffs and farmers throughout the country about the "oxygen limiting" and feed storage capabilities of the Harvestore structure; or

(b) Information and materials that establish the falsity of the representations made by AOS and AOSHPI to Plaintiffs and farmers throughout the county about the "oxygen limiting" and feed storage capabilities of the Harvestore structure.

68. Each use by the Dealer Organization, MVBA, AOS, AOSHPI and Venard Film Library of the interstate telephone lines to transmit the information constitute an act of wire fraud within the meaning of 18 U.S.C. § 1961(1)(b).

69. The actions of the Dealer Organization, MVBA, AOSHPI and AOS, as summarized in paragraphs 63 through 68, constitute a "pattern of racketeering activity" as that term is defined in 18 U.S.C. § 1961(5), in that its actions affecting Plaintiffs and farmers throughout the country were related, spanned a period of at least seventeen (17) years and by their nature pose a continuing threat of racketeering activity.

70. At all times herein mentioned, AOS, AOSHPI, the Dealer Organization and MVBA, both directly and by and through their agents, representatives, and/or employees, transmitted these materials and made these fraudulent representations to the Plaintiffs and other farmers throughout the country.

71. AOSHPI, AOS, MVBA, and/or the Dealer Organization through their association in fact in developing, marketing and selling Harvestore structures through fraudulent representations is an enterprise engaged in and affecting interstate and foreign commerce within the meaning of 18 U.S.C. § 1961(4). AOS and AOSHPI are the perpetrators of the racketeering activity, using MVBA and/or the Dealer Organization as the passive instrument of this activity.

72. In the alternative, the Dealer Organization and/or MVBA is the enterprise in fact within the meaning of 18 U.S.C. § 1961(4), which as a conduit and passive instrument, was used by AOS and AOSHPI to perpetrate the pattern of racketeering activity involved in the sale and marketing of Harvestore structures.



73. AOS, while associated with the enterprise, participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c).

74. AOSHPI, while associated with the enterprise, participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c).

75. As a direct and proximate result of AOSHPI and AOS participation in the conduct of the affairs of the enterprise through a pattern of racketeering activity, Plaintiffs have suffered substantial damages as outlined at paragraph 31.

#### COUNT IV

##### RICO § 1962(a) - AOS AND AOSHPI

76. Plaintiffs incorporate by reference paragraphs 1 through 75.

77. AOS, through its association in fact with the enterprise comprised of AOS, AOSHPI, MVBA, and/or the Dealer Organization (or alternatively, MVBA and/or the Dealer Organization as the enterprise as outlined in paragraph 72) participated as principals in the pattern of racketeering activity within the meaning of 18 U.S.C. § 1962 (a) and invested the monies generated from the sale of the Harvestore structures secured through the pattern of racketeering activity in the operation of its business activities, and, in particular, used these proceeds to (A) fund the continuing marketing and sale of Harvestore structures as "oxygen limiting" feed storage structures, and (B) also funded post-sale misrepresentations to

Plaintiffs and other farmers, including, but not limited to magazines, movies, and other literature, and (C) also funded efforts to conceal known product defects from Plaintiffs, other farmers similarly situated, MVBA and other Harvestore dealers, and (D) also funded Agristor Credit Corporation, which is a separate, wholly-owned subsidiary of AOS, whose sole business is the financing of the sale or lease of AOSHPI products (both to the farmer and to members of the Dealer Organization), and the profits of which inure solely to the benefit of AOS.

78. This investment of proceeds by AOS to perpetuate and further its racketeering activities, through the methods described above, of the Harvestore structures to Plaintiffs and to farmers throughout the country over a period spanning at least 1973 to 1991, constitutes of violation of 18 U.S.C. § 1962(a).

79. AOSHPI, through its association in fact with the enterprise comprised of AOS, AOSHPI, MVBA, and/or the Dealer Organization (or alternatively MVBA and/or the Dealer Organization or the enterprise as outlined in Paragraph 72), participated as a principal in the pattern of racketeering activity within the meaning of 18 U.S.C. § 1962(a) and invested the monies generated from the sale of the Harvestore structures secured through the pattern of racketeering activity in the operation of its business activities, and, in particular, used these proceeds to (A) fund the continuing marketing and sale of Harvestore structures as "oxygen limiting" feed storage structures, and (B) also funded post-sale misrepresentations to Plaintiffs and other farmers, including, but not limited to magazines, movies, and other literature, and (C) also funded efforts to conceal known product defects from Plaintiffs, other



farmers similarly situated, MVBA and other Harvestore dealers, and (D) also funded Agristor Credit Corporation, which is a separate, wholly-owned subsidiary of AOS, whose sole business is the financing of the sale or lease of AOSHPI products (both to the farmer and to members of the Dealer Organization), and the profits of which inure solely to the benefit of AOS.

80. This investment of proceeds by AOSHPI to perpetuate and further its racketeering activities, through the methods described above, of Harvestore structures to Plaintiffs and to farmers throughout the country over a period of spanning at least 1973 to 1986, constitutes a violation of 18 U.S.C. § 1962(a).

81. Plaintiffs and farmers throughout the country suffered direct and specific injury from AOS and AOSHPI's investment of the proceeds of its racketeering activity into that portion of its business operations tied to marketing and selling Harvestore structures because it was by and through AOS and AOSHPI's that Plaintiffs and farmers across the country were prevented from learning the truth about defects in Harvestore structures, and were thereby caused to continue to use their Harvestore silos and continued to suffer damage as a result thereof. Without the investment of the proceeds of the racketeering activity, the falsity of Defendants representations would have been made known sooner to the Plaintiffs and other farmers throughout the country, thereby significantly decreasing the damages to such persons.

82. As a direct and proximate result of the reinvestment of income illegally obtained by AOS and

AOSHPI, the Plaintiffs have incurred substantial damages as outlined at paragraph 31.

COUNT V  
NEGLIGENT MISREPRESENTATION - AOS AND  
AOSHPI

83. Plaintiffs reallege paragraphs 1 through 82.

84. Plaintiffs reallege the same conduct as outlined in paragraphs 1 through 82 herein but allege in the alternative that the conduct of the Defendants was negligent as opposed to intentional.

85. Such conduct, even though negligent, was done with reckless disregard to the rights of the Plaintiffs.

86. As a direct and proximate result of the activities of AOS and AOSHPI, the Plaintiffs have incurred substantial damages.

COUNT VI  
VIOLATION OF FALSE ADVERTISING STATUTE -  
MINN. STAT. 325F.67

87. Plaintiffs reallege paragraphs 1 through 86 herein.

88. The Defendants conduct as outlined above, whether the same be intentional or negligent, constitutes a violation of the Minnesota False Advertising Statute, Minn. Stat. 325F.67, entitling the Plaintiffs to an award of

compensatory damages, attorney fees, and reasonable costs of investigation and injunctive relief pursuant to Minn. Stat. 8.31.

COUNT VII  
VIOLATION OF CONSUMER FRAUD ACT - MINN.  
STAT. 325F.68-70

89. Plaintiffs reallege paragraphs 1 through 88 herein.

90. That Defendants conduct as outlined above, constitutes a violation of the Minnesota Consumer Fraud Act, Minn. Stat. 325F.68-70 and also entitles Plaintiffs to an award of attorney fees, compensatory damages, and reasonable costs of investigation and injunctive relief pursuant to Minn. Stat. 8.31.

COUNT VIII  
MISREPRESENTATION OF QUALITY - MINN. STAT.  
325D.13 ET SEQ.

91. Plaintiffs reallege paragraphs 1 through 90 herein.

92. That Defendants conduct as outlined above constitutes a misrepresentation of quality, in violation of Minn. Stat. 325D.13, entitling Plaintiffs to damages, attorney fees and injunctive relief pursuant to Minn. Stat. 325D.15.

COUNT IX  
VIOLATION OF UNIFORM DECEPTIVE TRADE  
PRACTICES ACT  
MINN. STAT. 325D.44

93. Plaintiffs reallege paragraphs 1 through 92 herein.

94. That the conduct of the Defendants as outlined above, constitutes a violation of Minn. Stat. 325D.44, subd. 1(1), (2), (3), (4), (5), (7), (8), (9), (13).

95. Plaintiffs are entitled to damages, attorney fees, and injunctive relief for such violations pursuant to Minn. Stat. 325D.45.

96. As a direct and proximate result of the activities of AOS and AOSHPI, the Plaintiffs have incurred substantial damages.

WHEREFORE, Plaintiffs request this Court to enter a judgment in their favor and against Defendants for an amount not less than \$50,000.00 and in a sum three times the actual damages proved at trial, attorney fees, costs and disbursements, and reasonable expenses for investigation, interest and that the court (a) enjoin all unlawful practices, (b) and enjoin the sale of Harvestore silos, and (c) require that the Defendants publish to Harvestore farmers information concerning known product defects.

Dated this 26th day of November, 1993.

BIRD AND JACOBSEN

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**(Affidavit of Service Omitted in Printing)**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**Case No. 3:94-424**

**MARVIN KLEHR and MARY KLEHR,**

**Plaintiffs,**

**vs.**

**A.O. SMITH CORPORATION and  
A.O. SMITH HARVESTORE PRODUCTS,  
INC., Jointly and Severally,**

**Defendants.**

**DEFENDANT A.O. SMITH CORPORATION'S  
ANSWER  
TO AMENDED COMPLAINT**

---

Defendant, A.O. Smith Corporation ("Smith"), for its Answer to Plaintiff's Amended Complaint, states as follows:

1. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Amended Complaint and, accordingly, denies those allegations.

2. Smith admits that it is a Delaware corporation, that it is a diversified manufacturer of a variety of products



and services including automobile frames and water heaters and that, in the late 1940's until 1961, it researched, designed, patented, manufactured and marketed Harvestore feed storage structures. Smith denies the remaining allegations contained in paragraph 2 of the Amended Complaint.

3. Smith admits the allegations contained in paragraph 3 of the Amended Complaint except Smith denies that AOSHPI was "incorporated in June 1961 by AOS".

4. Smith admits that Minnesota Valley Breeders Association ("MVBA") is a Minnesota company doing business in the State of Minnesota and has been engaged in the business of selling, distributing, installing, assembling, servicing, repairing and modifying farm equipment, machinery and structures. Smith denies the remaining allegations contained in paragraph 4 of the Amended Complaint.

#### Jurisdiction

5. Smith admits that plaintiff's Amended Complaint purports to assert an amount in controversy exceeding \$50,000 exclusive of interest and costs but denies that plaintiffs have stated a claim against Smith exceeding that amount.

6. Smith admits that plaintiffs purport to base jurisdiction on Title 28 U.S.C. §1331, 28 U.S.C. §1332, and 18 U.S.C. §1961 et seq.

#### General Allegations

7. Smith admits that from 1949 to 1961 it marketed Harvestore feed storage structures and that from 1961 to the present AOSHPI has marketed Harvestore feed storage structures for a total sales volume of approximately 75,000 in the aggregate. Smith denies the remaining allegations contained in paragraph 7 of the Amended Complaint.

8. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Amended Complaint and, accordingly, denies those allegations.

9. Smith admits that the term "haylage" is one that it first used in the 1940's and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 9 of the Amended Complaint and, accordingly, denies those allegations.

10. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 including subparagraphs (a)-(d) of the Amended Complaint regarding what, when and how plaintiffs received the alleged various sales literature, or as to plaintiffs' knowledge, beliefs, judgments, misjudgments, actions, inactions and other conduct before, during and after they allegedly received the various sales literature and, accordingly, denies those allegations. Answering further, Smith states that the form and content of the alleged various sales literature speak for themselves and affirmatively denies that any false, misleading or confusing material statement is contained therein. Smith lacks knowledge or information sufficient to

form a belief as to the truth of the allegation that the Harvestore Farmer magazine (later named Harvestore System Farming) was published by AOSHPI and produced by Dave Brown & Associates, Chicago, Illinois, that before publication, each issue was submitted to Smith for approval and that each issue of the Harvestore Farmer magazine was thereafter transferred to Missouri where it was printed and mailed to farmers and dealers and, accordingly, denies those allegations. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations that all advertisements of the Harvestore silos contained in the Hoard's Dairyman magazine were submitted to Smith for approval before being published and that defendants used the U.S. mails to deliver advertising copy to Hoard's Dairyman magazine with the expectation and knowledge that the magazine would be mailed to plaintiffs and other farmers similarly situated and, accordingly, denies those allegations. Smith denies each and every remaining allegation contained in paragraph 10 including subparagraphs (a)-(d) of the Amended Complaint.

11. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Amended Complaint and, accordingly, denies those allegations.

12. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the Amended Complaint and, accordingly, denies those allegations.

13. Smith denies that it maintained all warranty files and administered claims regarding Harvestore silos and lacks

information or knowledge sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 13 of the Amended Complaint and, accordingly, denies those allegations.

14. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the Amended Complaint and, accordingly, denies those allegations.

15. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 including subparagraphs (a)-(cc) of the Amended Complaint regarding whether, what, when and how plaintiffs received the alleged magazines, or what plaintiffs believed, relied upon, understood, questioned, felt was important, realized or otherwise knew with regard to any of those allegations and, accordingly, denies them. Smith states that the contents of the magazines alleged in paragraph 15 of the Amended Complaint speak for themselves and Smith affirmatively denies that they contain any false, misleading or confusing material statements, omissions or depictions. Smith denies each and every remaining allegation contained in paragraph 15 of the Amended Complaint.

16. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 including subparagraphs (a)-(i) of the Amended Complaint regarding whether, what, when and how plaintiffs received the alleged magazines and films, or what plaintiffs believed, relied upon, understood, questioned, felt was important, realized or otherwise knew with regard to any of those allegations and, accordingly, denies them. Smith states



that the contents of the magazines and films alleged in paragraph 16 of the Amended Complaint speak for themselves and Smith affirmatively denies that they contain any false, misleading or confusing material statements, omissions or depictions. Smith denies each and every remaining allegation contained in paragraph 16 including subparagraphs (a)-(i) of the Amended Complaint.

17. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Amended Complaint regarding what representations were made to plaintiffs or what plaintiffs believed to be material and, accordingly, denies those allegations. Smith denies the remaining allegations contained in paragraph 17 of the Amended Complaint.

18. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Amended Complaint and, accordingly, denies those allegations.

19. Smith denies the allegations contained in paragraph 19 of the Amended Complaint.

20. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations of what plaintiffs believed, relied upon or thought material and, accordingly, denies those allegations. Smith denies the remaining allegations contained in paragraph 20 of the Amended Complaint.

21. Smith denies the allegations contained in paragraph 21 of the Amended Complaint.

22. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Amended Complaint and, accordingly, denies those allegations.

23. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Amended Complaint and, accordingly, denies those allegations.

24. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Amended Complaint and, accordingly, denies those allegations.

25. Smith denies the allegations contained in paragraph 25 of the Amended Complaint.

26. Smith denies the allegations contained in paragraph 26 of the Amended Complaint.

27. Smith denies the allegations contained in paragraph 27 of the Amended Complaint. In the event plaintiffs attempt to assert a claim for punitive damages pursuant to the allegations contained in paragraph 27 of the Amended Complaint, such a claim is premature and in violation of Minn. Stat. §549.121.

28. Smith denies the allegations contained in paragraph 28 of the Amended Complaint.

29. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in



paragraph 29 of the Amended Complaint and, accordingly, denies those allegations.

30. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Amended Complaint and, accordingly, denies those allegations.

31. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the Amended Complaint that in the months and years after Plaintiffs stopped using the 25' x 80' Harvestore silo, Plaintiffs' milk production increased dramatically and they became convinced that the Harvestore structure was responsible for their dairy herd problems and, accordingly, denies those allegations. Smith denies each and every remaining allegation contained in paragraph 31 of the Amended Complaint.

#### COUNT I FRAUD - AOSHPI

32. Smith incorporates by reference its answers to paragraph 1 through 31 as its answer to paragraph 32 of Count I of the Amended Complaint.

33. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of Count I of the Amended Complaint and, accordingly, denies those allegations.

34. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 of Count I of the Amended Complaint and, accordingly, denies those allegations.

35. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35 of Count I of the Amended Complaint and, accordingly, denies those allegations.

36. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36 of Count I of the Amended Complaint and, accordingly, denies those allegations.

37. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of Count I of the Amended Complaint and, accordingly, denies those allegations.

38. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38 of Count I of the Amended Complaint and, accordingly, denies those allegations.

39. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of Count I of the Amended Complaint and, accordingly, denies those allegations.

40. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in

paragraph 40 of Count I of the Amended Complaint and, accordingly, denies those allegations.

41. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of Count I of the Amended Complaint and, accordingly, denies those allegations.

42. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 of Count I of the Amended Complaint and, accordingly, denies those allegations.

43. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of Count I of the Amended Complaint and, accordingly, denies those allegations.

44. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of Count I of the Amended Complaint and, accordingly, denies those allegations.

45. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45 of Count I of the Amended Complaint and, accordingly, denies those allegations.

46. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 46 of Count I of the Amended Complaint and, accordingly, denies those allegations.

47. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 47 of Count I of the Amended Complaint and, accordingly, denies those allegations.

48. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 48 of Count I of the Amended Complaint and, accordingly, denies those allegations.

49. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 49 of Count I of the Amended Complaint and, accordingly, denies those allegations. In the event plaintiffs attempt to assert a claim for punitive damages pursuant to the allegations contained in paragraph 49 of Count I of the Amended Complaint, such a claim is premature and in violation of Minn. Stat. §549.121.

## COUNT II Fraud - AOS

50. Smith incorporates by reference its answers to paragraph 1 through 49 as its answer to paragraph 50 of Count II of the Amended Complaint.

51. Smith denies the allegations contained in paragraph 51 of Count II of the Amended Complaint.

52. Smith admits that, from time to time, it rendered certain research and development services and was engaged in the distribution of replacement parts for AOSHPI, for which Smith was compensated by AOSHPI, concerning Harvestore



structures of the type purchased by plaintiffs and denies the remaining allegations contained in paragraph 52 of Count II of the Amended Complaint.

53. Smith admits that, from time to time, AOSHPI retained the legal services of Smith's Law Department, for which Smith was compensated by AOSHPI but lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 53 of Count II of the Amended Complaint as to whether it reviewed any Harvestore structure sales training materials, all sales literature and all films made available by AOSHPI to its authorized dealers and, accordingly, denies those allegations. Smith admits that, from time to time, it provided AOSHPI with some printing and distribution services for which Smith was compensated by AOSHPI. Smith lacks knowledge or information sufficient to form a belief as to the definition of "promotional materials," cannot formulate a response to that allegation and, accordingly, denies that allegation. Smith lacks knowledge or information sufficient to form a belief as to what materials were allegedly furnished to plaintiffs and, accordingly, denies those allegations. Answering further, Smith denies the remaining allegations contained in paragraph 53 of Count II of the Amended Complaint.

54. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of Count II of the Amended Complaint as to whether it approved the content of any sales training materials, all sales literature, all films and all magazines regarding the Harvestore structure or as to what representations were received by plaintiffs and material to their decision to purchase the Harvestore structure, as well as the continued use,

operation, maintenance and repair of such structure and, accordingly, denies those allegations. Smith lacks knowledge or information sufficient to form a belief as to the definition of "promotional materials," cannot formulate a response to that allegation and, accordingly, denies that allegation. Smith denies the remaining allegations in paragraph 54 of Count II of the Amended Complaint.

55. Smith denies the allegations contained in paragraph 55 of Count II of the Amended Complaint.

56. Smith denies the allegations contained in paragraph 56 of Count II of the Amended Complaint.

57. Smith denies the allegations contained in paragraph 57 of Count II of the Amended Complaint.

58. Smith denies the allegations contained in paragraph 58 of Count II of the Amended Complaint.

59. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 59 of Count II of the Amended Complaint and, accordingly, denies those allegations.

60. Smith denies the allegations contained in paragraph 60 of Count II of the Amended Complaint.

61. Smith denies the allegations contained in paragraph 61 of Count II of the Amended Complaint. In the event plaintiffs attempt to assert a claim for punitive damages pursuant to the allegations contained in paragraph 61 of Count



II of the Amended Complaint, such a claim is premature and in violation of Minn. Stat. §549.121.

### COUNT III

#### RICO 1962(c) - AOS AND AOSHPI

62. Smith incorporates by reference its answers to paragraphs 1 through 61 as its answer to paragraph 62 of Count III of the Amended Complaint.

63. Smith admits that it used the mails in the ordinary course of its business for ordinary business activities and denies that such use was in furtherance of any scheme to defraud plaintiffs or others. Smith lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 63, including subparagraphs (a)-(m), of Count III of the Amended Complaint regarding alleged representations made to plaintiffs and, accordingly, denies those allegations.

64. Smith denies the allegations contained in paragraph 64, including subparagraphs (a)-(c), of Count III of the Amended Complaint.

65. Smith denies the allegations contained in paragraph 65 of Count III of the Amended Complaint.

66. Smith admits that it used interstate telephone lines in the ordinary course of its business for ordinary business activities and denies that such use was in furtherance of any scheme to defraud plaintiffs or others. Smith lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 66, including

subparagraphs (a)-(e), of Count III of the Amended Complaint regarding alleged representations made to plaintiffs and, accordingly, denies those allegations.

67. Smith denies the allegations contained in paragraph 57, including subparagraphs (a)-(b), of Count III of the Amended Complaint.

68. Smith denies the allegations contained in paragraph 68 of Count III of the Amended Complaint.

69. Smith denies the allegations contained in paragraph 69 of Count III of the Amended Complaint.

70. Smith denies the allegations contained in paragraph 70 of Count III of the Amended Complaint.

71. Smith denies the allegations contained in paragraph 71 of Count III of the Amended Complaint.

72. Smith denies the allegations contained in paragraph 72 of Count III of the Amended Complaint.

73. Smith denies the allegations contained in paragraph 73 of Count III of the Amended Complaint.

74. Smith denies the allegations contained in paragraph 74 of Count III of the Amended Complaint.

75. Smith denies the allegations contained in paragraph 75 of Count III of the Amended Complaint.

COUNT IV  
RICO 1962(a) - Smith AND AOSHPI

76. Smith incorporates by reference its answers to paragraphs 1 through 75 as its answer to paragraph 76 of Count IV of the Amended Complaint.

77. Smith denies the allegations contained in paragraph 77 of Count IV of the Amended Complaint.

78. Smith denies the allegations contained in paragraph 78 of Count IV of the Amended Complaint.

79. Smith denies the allegations contained in paragraph 79 of Count IV of the Amended Complaint.

80. Smith denies the allegations contained in paragraph 80 of Count IV of the Amended Complaint.

81. Smith denies the allegations contained in paragraph 81 of Count IV of the Amended Complaint.

82. Smith denies the allegations contained in paragraph 82 of Count IV of the Amended Complaint.

COUNT V  
NEGLIGENT MISREPRESENTATION -  
SMITH AND AOSHPI

83. Smith incorporates by reference its answers to paragraphs 1 through 82 as its answer to paragraph 83 of Count V of the Amended Complaint.

84. Smith incorporates by reference its answers to paragraphs 1 through 82 as its answer to paragraph 84 of Count V of the Amended Complaint. Smith denies that its conduct was either negligent or intentional.

85. Smith denies the allegations contained in paragraph 85 of Count V of the Amended Complaint.

86. Smith denies the allegations contained in paragraph 86 of Count V of the Amended Complaint.

COUNT VI  
VIOLATION OF FALSE ADVERTISING STATUTE -  
MINN. STAT. 325F.67

87. Smith incorporates by reference its answers to paragraphs 1 through 86 as its answer to paragraph 87 of Count VI of the Amended Complaint.

88. Smith denies the allegations contained in paragraph 88 of Count VI of the Amended Complaint.

COUNT VII  
VIOLATION OF CONSUMER FRAUD ACT - MINN.  
STAT. 325F.68-70

89. Smith incorporates by reference its answers to paragraphs 1 through 88 as its answer to paragraph 89 of Count VII of the Amended Complaint.

90. Smith denies the allegations contained in paragraph 90 of Count VII of the Amended Complaint.



**COUNT VIII**  
**MISREPRESENTATION OF QUALITY - MINN. STAT.**  
**325D.13 ET SEQ.**

91. Smith incorporates by reference its answers to paragraphs 1 through 90 as its answer to paragraph 91 of Count VIII of the Amended Complaint.

92. Smith denies the allegations contained in paragraph 92 of Count VIII of the Amended Complaint.

**COUNT IX**  
**VIOLATION OF UNIFORM DECEPTIVE**  
**TRADE PRACTICES ACT**  
**MINN. STAT. 325D.44**

93. Smith incorporates by reference its answers to paragraphs 1 through 92 as its answer to paragraph 93 of Count IX of the Amended Complaint.

94. Smith denies the allegations contained in paragraph 94 of Count IX of the Amended Complaint.

95. Smith denies the allegations contained in paragraph 95 of Count IX of the Amended Complaint.

96. Smith denies the allegations contained in paragraph 96 of Count IX of the Amended Complaint.

97. Except as specifically admitted, qualified or otherwise answered herein, Smith denies each and every matter, allegation and averment contained in the Amended Complaint.

**AFFIRMATIVE DEFENSES**  
**FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' Amended Complaint, and each purported claim alleged therein, fails to state a claim upon which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' Amended Complaint, and each purported claim alleged therein, is barred by the applicable statutes of limitation.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffs' Amended Complaint, and each purported claim alleged therein, is barred by the doctrine of laches.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' Amended Complaint, each purported claim alleged therein, is barred, in whole or in part, by plaintiffs' failure to mitigate damages.

**FIFTH AFFIRMATIVE DEFENSE**

Any damages incurred by plaintiffs were proximately caused by their own acts and/or omissions, thereby precluding or reducing any recovery of damages by plaintiffs.



#### SIXTH AFFIRMATIVE DEFENSE

The Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § § 1961 - 68) violates AOS' due process right protected by the Fifth and Fourteenth Amendments of the United States Constitution of Article 1, §7 of the Minnesota Constitution.

#### SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' Complaint, and each purported claim alleged therein, is barred by the doctrines of waiver and/or estoppel.

#### EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint, to the extent it seeks punitive or exemplary damages, violates Minn. Stat. §549.121 and violates Smith's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and of Article 1, §7 of the Minnesota Constitution.

WHEREFORE, defendant A.O. Smith Corporation respectfully prays that the Court enter a judgment in its favor dismissing plaintiffs' Amended Complaint with prejudice and awarding to it its reasonable costs and attorneys fees and such other and further relief as the Court deems just and appropriate.

Dated: January 24, 1994 KATTEN MUCHIN & ZAVIS

By: /s/ David K. Schmitt

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(Affidavit of Service Omitted in Printing)

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No.: 4-93-822 (JMR)

Marvin Klehr and

Mary Klehr,

Plaintiffs,

vs.

A.O. Smith Corporation and  
A.O. Smith Harvestore Products,  
Inc., Jointly and Severally,

Defendants.

DEFENDANT A.O. SMITH HARVESTORE  
PRODUCTS, INC.'S ANSWER TO  
PLAINTIFFS' AMENDED COMPLAINT

Defendant A.O. Smith Harvestore Products, Inc.  
("AOSHPI"), for its answer to plaintiffs' Amended Complaint,  
states as follows:

1. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Amended Complaint and therefore denies those allegations.

2. AOSHPI admits that A.O. Smith Corporation ("A.O. Smith") is a Delaware corporation which manufactures a variety of products, supplies and services, including automobile frames and water heaters, and that until 1961, A.O. Smith researched, designed, patented, manufactured and marketed Harvestore silos. AOSHPI denies the remaining allegations in paragraph 2 of the Amended Complaint.

3. AOSHPI admits the allegations contained in paragraph 3 of the Amended Complaint, except that AOSHPI denies it was incorporated "by AOS."

4. AOSHPI admits that Minnesota Valley Breeders Association ("MVBA") is a Minnesota company doing business in the state of Minnesota and has been engaged in the business of selling, distributing, installing, assembling, servicing, repairing and modifying farm equipment and machinery, and denies the remaining allegations in paragraph 4 of the Amended Complaint.

5. AOSHPI admits that plaintiffs' Amended Complaint purports to assert an amount in controversy exceeding \$50,000, but denies that plaintiffs have stated a claim against AOSHPI exceeding that amount.

6. AOSHPI admits that plaintiffs purport to base jurisdiction upon 28 U.S.C. §§ 1331, 1332 and 1961, et seq.

7. AOSHPI admits that A.O. Smith sold Harvestore silos before 1961, that AOSHPI has sold Harvestore silos since 1961 and that the total number of Harvestore silos sold since 1949 is approximately 75,000.



AOSHPI denies the remaining allegations in paragraph 7 of the Amended Complaint.

8. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Amended Complaint, and therefore denies those allegations.

9. AOSHPI admits that the term "haylage" was first used in the 1940's and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 9 of the Complaint and therefore denies those allegations.

10. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the Amended Complaint regarding what materials were provided to or received by plaintiffs; how, if or when such materials were provided to plaintiffs or received by plaintiffs; whether plaintiffs relied upon such materials; or what plaintiffs knew, believed, felt, judged, questioned, decided or did before, during or after receiving such materials. AOSHPI therefore denies those allegations. AOSHPI further states that the contents of the materials referred to in paragraph 10 of the Amended Complaint speak for themselves, and specifically denies that it made any false, misleading, fraudulent or intentionally confusing statements, representations, depictions, claims, comparisons, implications or omissions in those materials. AOSHPI admits that Harvestore Farmer magazine (later named Harvestore System Farming magazine) was published by AOSHPI and produced by Dave Brown & Associates, Chicago, Illinois. AOSHPI lacks knowledge or information sufficient to form a belief as

to the truth of the allegations that each issue of the Harvestore Farmer magazine was submitted to A.O. Smith for approval before publication and was transferred to Missouri where it was printed and mailed to farmers and dealers, and therefore denies those allegations.

AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations that defendants used the U.S. Mail to deliver advertising copy to Hoard's Dairyman with the expectation and knowledge that the magazine would be mailed to plaintiffs and other farmers similarly situated, and that all advertisements in the magazine were submitted to A.O. Smith for approval before being published. AOSHPI denies each and every remaining allegation contained in paragraph 10 of the Amended Complaint.

11. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Amended Complaint regarding what visits or telephone calls were made to the plaintiffs by Richard Deutsch or what representations were made to the plaintiffs by Mr. Deutsch, oral or otherwise, and therefore denies the allegations in paragraph 11 of the Amended Complaint.

12. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Amended Complaint and therefore denies those allegations.

13. Upon information and belief, admits that plaintiffs purchased a Harvestore silo from MVBA on or about July 15, 1974 and that the purchase order was



forwarded by MVBA to AOSHPI, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 13 of the Amended Complaint and therefore denies those allegations.

14. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the Amended Complaint and therefore denies those allegations.

15. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 regarding what materials or magazines plaintiffs received through the U.S. Mail; how, when or if such materials were received by plaintiffs; what plaintiffs relied upon, believed, knew, understood, conceived, questioned, doubted, felt was important, realized, decided or did before, during or after they allegedly received the materials referred to in paragraph 15. AOSHPI therefore denies those allegations. AOSHPI states that the contents of the magazines, advertisements and articles referred to in paragraph 15 of the Amended Complaint speak for themselves, and specifically denies that they contain any false, misleading, fraudulent or intentionally confusing statements, representations, depictions, analogies, implications, lies or omissions. AOSHPI denies each and every remaining allegation contained in paragraph 15 of the Amended Complaint.

16. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 regarding what meetings or gatherings plaintiffs attended; what information, literature or films plaintiffs received at such gatherings or meetings or

through the U.S. Mail; how, when or if such information or materials were received by plaintiffs; or what plaintiffs believed, relied upon, understood, became convinced of, questioned, had faith in, knew, realized, decided or did before, during or after allegedly received the materials referred to in paragraph 16 of the Amended Complaint. AOSHPI accordingly denies those allegations. AOSHPI states that the contents of the magazines, advertisements, films and materials referred to in paragraph 16 of the Amended Complaint speak for themselves, and affirmatively denies that AOSHPI made false, misleading or fraudulent statements, representations, implications, depictions, suggestions or omissions. AOSHPI denies each and every remaining allegation in paragraph 16 of the Amended Complaint.

17. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 of the Amended Complaint regarding what representations were made to the plaintiffs or what representations plaintiffs deemed to be material, and therefore denies those allegations. AOSHPI denies the remaining allegations contained in paragraph 17 of the Amended Complaint.

18. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Amended Complaint and therefore denies those allegations.

19. AOSHPI denies the allegations in paragraph 19 of the Amended Complaint.

20. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 of the Amended Complaint regarding what plaintiffs relied upon, believed or deemed to be material, and therefore denies those allegations. AOSHPI denies the remaining allegations contained in paragraph 20 of the Amended Complaint.

21. AOSHPI denies the allegations in paragraph 21 of the Amended Complaint.

22. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Amended Complaint and therefore denies those allegations.

23. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Amended Complaint and therefore denies those allegations.

24. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Amended Complaint and therefore denies those allegations.

25. AOSHPI denies the allegations of paragraph 25 of the Amended Complaint.

26. AOSHPI denies the allegations contained in paragraph 26 of the Amended Complaint

27. AOSHPI denies the allegations contained in paragraph 27 of the Amended Complaint.

AOSHPI further states that if, by this allegation, plaintiffs seek to allege a claim for punitive damages, their claim is premature and made in violation of MINN. STAT. § 549.191.

28. AOSHPI denies the allegations contained in paragraph 28 of the Amended Complaint.

29. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29 of the Amended Complaint and therefore denies those allegations.

30. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Amended Complaint and therefore denies those allegations.

31. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 31 of the Amended Complaint, and therefore denies those allegations. AOSHPI denies the remaining allegations in paragraph 31 of the Amended Complaint.

32. AOSHPI incorporates by reference its answers to paragraphs 1 through 31 of the Amended Complaint as its answer to paragraph 32 of the Amended Complaint.

33. AOSHPI denies the allegations of paragraph 33 of the Amended Complaint.



34. AOSHPI denies the allegations contained in paragraph 34 of the Amended Complaint.

35. AOSHPI admits it provided sales training to independent Harvestore dealers from time to time and that MVBA could choose to participate in such training at its own cost, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 35 of the Amended Complaint and therefore denies those allegations.

36. AOSHPI denies the allegations in paragraph 36 of the Amended Complaint.

37. AOSHPI denies that it instructed MVBA salesmen regarding what representations to make to prospective purchasers, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 37 of the Amended Complaint and therefore denies those allegations.

38. AOSHPI admits it made sales literature regarding Harvestore silos available to its independent dealers to purchase for their own use, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 38 of the Amended Complaint and therefore denies those allegations.

39. AOSHPI denies the allegations in paragraph 39 of the Amended Complaint.

40. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations

contained in paragraph 40 of the Amended Complaint and therefore denies those allegations.

41. AOSHPI admits that it intended for its sales literature and promotional materials to be received by farmers, if its independent dealers chose to provide such information to those farmers, and denies the remaining allegations in paragraph 41 of the Amended Complaint.

42. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 of the Amended Complaint and therefore denies those allegations.

43. AOSHPI denies the allegations in paragraph 43 of the Amended Complaint.

44. AOSHPI denies the allegations in paragraph 44 of the Amended Complaint.

45. AOSHPI denies the allegations in paragraph 45 of the Amended Complaint.

46. AOSHPI denies the allegations contained in paragraph 46 of the Amended Complaint.

47. AOSHPI denies it made false representations, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 47 of the Amended Complaint and therefore denies those allegations.



48. AOSHPI denies the allegations contained in paragraph 48 of the Amended Complaint.

49. AOSHPI denies the allegations contained in paragraph 49 of the Amended Complaint. AOSHPI further states that if, by this allegation, plaintiffs seek to allege a claim for punitive damages, their claim is premature and made in violation of MINN. STAT. § 549.191.

50. AOSHPI incorporates by reference its answers and responses to paragraphs 1 through 49 of the Amended Complaint as its Answer to paragraph 50 of the Amended Complaint.

51. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 51 of the Amended Complaint, and therefore denies those allegations.

52. AOSHPI admits that A.O. Smith, from time-to-time, rendered certain research and development services and was engaged in the distribution of replacement parts for AOSHPI, for which AOSHPI was charged by A.O. Smith, and denies the remaining allegations in paragraph 52 of the Amended Complaint.

53. AOSHPI admits that, from time-to-time, it retained the legal services of the A.O. Smith law department, for which services AOSHPI was charged by A.O. Smith, but lacks information or knowledge sufficient to form a belief as to the truth of the allegations as to whether the A.O. Smith law department reviewed any Harvestore sales training materials, all sales literature and all films made available by

AOSHPI to its independent dealers and therefore denies those allegations. AOSHPI admits A.O. Smith provided it with some printing and distribution services from time-to-time, for which AOSHPI was charged by A.O. Smith. AOSHPI lacks knowledge or information sufficient to form a belief as to what materials were furnished to the plaintiffs, and therefore denies those allegations. AOSHPI denies the remaining allegations in paragraph 53 of the Amended Complaint.

54. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of the Amended Complaint as to whether the A.O. Smith law department approved the content of any sales training materials, all sales literature, all films and all magazines regarding the Harvestore structure and how it operated, and as to what representations were made to the plaintiffs and were material to their decision to purchase the Harvestore silo as well as the continued use, operation, maintenance and repair of the silo, and therefore denies those allegations. AOSHPI denies the remaining allegations in paragraph 54 of the Amended Complaint.

55. AOSHPI denies the allegations of paragraph 55 of the Amended Complaint.

56. AOSHPI denies the allegations of paragraph 56 of the Amended Complaint.

57. AOSHPI denies the allegations of paragraph 57 of the Amended Complaint.

58. AOSHPI denies the allegations in paragraph 58 of the Amended Complaint.

59. AOSHPI denies that false representations were made to the plaintiffs through AOSHPI and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 59 of the Amended Complaint and therefore denies those allegations.

60. AOSHPI denies the allegations of paragraph 60 of the Amended Complaint.

61. AOSHPI denies the allegations of paragraph 61 of the Amended Complaint. AOSHPI further states that if, by this allegation, plaintiffs seek to allege a claim for punitive damages, their claim is premature and made in violation of MINN. STAT. § 549.191.

62. AOSHPI incorporates by reference its answers and responses to paragraphs 1 through 61 of the Amended Complaint as its Answer to paragraph 62 of the Amended Complaint.

63. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 63 of the Amended Complaint regarding the representations made to the plaintiffs prior to or after the sale of Harvestore silo, and whether AOSHPI or A.O. Smith used the mails or caused the mails to be used in connection with representations made to the plaintiffs prior to or after the sale of the Harvestore silo, and therefore denies those allegations. AOSHPI admits that it used the mails in the ordinary course of business to conduct its ordinary business activities, but specifically denies that it used the mails for any fraudulent or illegal purpose or to convey fraudulent, illegal or misleading information. AOSHPI states that the contents of

the various advertising, literature, and other materials speak for themselves, and specifically denies that they contain any false, misleading, fraudulent or intentionally confusing statements, representations, implications, depictions, information or omissions. AOSHPI denies each and every remaining allegation contained in paragraph 63 of the Amended Complaint.

64. AOSHPI denies the allegations contained in paragraph 64 of the Amended Complaint.

65. AOSHPI denies the allegations contained in paragraph 65 of the Amended Complaint.

66. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66 of the Amended Complaint regarding representations made to the plaintiffs prior to or after the sale of the Harvestore silo, and whether AOSHPI or A.O. Smith used interstate telephone lines or caused the interstate telephone lines to be used in connection with representations made to the plaintiffs prior to or after the sale of the Harvestore silos, and therefore denies those allegations. AOSHPI admits it used interstate telephone lines in the ordinary course of its business for ordinary business activities and denies that such use was in furtherance of a scheme to defraud plaintiffs or others or to convey fraudulent, illegal or misleading information. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 66 of the Amended Complaint and therefore denies those allegations.



67. AOSHPI denies the allegations in paragraph 67 of the Amended Complaint.

68. AOSHPI denies the allegations in paragraph 68 of the Amended Complaint.

69. AOSHPI denies the allegations in paragraph 69 of the Amended Complaint.

70. AOSHPI denies the allegations in paragraph 70 of the Amended Complaint.

71. AOSHPI denies the allegations in paragraph 71 of the Amended Complaint.

72. AOSHPI denies the allegations in paragraph 72 of the Amended Complaint.

73. AOSHPI denies the allegations in paragraph 73 of the Amended Complaint.

74. AOSHPI denies the allegations in paragraph 74 of the Amended Complaint.

75. AOSHPI denies the allegations in paragraph 75 of the Amended Complaint.

76. AOSHPI incorporates by reference its answers and responses to paragraphs 1 through 75 of the Amended Complaint as its answer to paragraph 76 of the Amended Complaint.

77. AOSHPI denies the allegations contained in paragraph 77 of the Amended Complaint.

78. AOSHPI denies the allegations contained in paragraph 78 of the Amended Complaint.

79. AOSHPI denies the allegations in paragraph 79 of the Amended Complaint.

80. AOSHPI denies the allegations in paragraph 80 of the Amended Complaint.

81. AOSHPI denies the allegations in paragraph 81 of the Amended Complaint.

82. AOSHPI denies the allegations in paragraph 82 of the Amended Complaint.

83. AOSHPI incorporates by reference its answers and responses to paragraphs 1 through 82 of the Amended Complaint as its answer to paragraph 83 of the Amended Complaint.

84. AOSHPI incorporates its answers to paragraphs 1 through 82 as its answer to paragraph 84 of the Amended Complaint and specifically denies that its conduct was negligent or intentional.

85. AOSHPI denies the allegations in paragraph 85 of the Amended Complaint.

86. AOSHPI denies the allegations in paragraph 86 of the Amended Complaint.

87. AOSHPI incorporates by reference its answers to paragraphs 1 through 86 of the Amended Complaint as its answer to paragraph 87 of the Amended Complaint.

88. AOSHPI denies the allegations contained in paragraph 88 of the Amended Complaint.

89. AOSHPI incorporates by reference its answers to paragraphs 1 through 88 of the Amended Complaint as its answer to paragraph 89 of the Amended Complaint.

90. AOSHPI denies the allegations in paragraph 90 of the Amended Complaint.

91. AOSHPI incorporates by reference its answers to paragraphs 1 through 90 of the Amended Complaint as its answer to paragraph 91 of the Amended Complaint.

92. AOSHPI denies the allegations in paragraph 92 of the Amended Complaint.

93. AOSHPI incorporates by reference its answers to paragraphs 1 through 92 of the Amended Complaint as its answer to paragraph 93 of the Amended Complaint.

94. AOSHPI denies the allegations in paragraph 94 of the Amended Complaint.

95. AOSHPI denies the allegations in paragraph 95 of the Amended Complaint.

96. AOSHPI denies the allegations in paragraph 96 of the Amended Complaint.

97. Except as specifically admitted, qualified or otherwise answered herein, AOSHPI denies each and every allegation, statement or averment contained in the Amended Complaint.

#### AFFIRMATIVE DEFENSES

1. AOSHPI affirmatively alleges that plaintiffs' Complaint fails to state a claim against it upon which relief may be granted.

2. AOSHPI affirmatively alleges that any damages suffered by the plaintiffs were caused or contributed to, in whole or in part, by persons for whom AOSHPI had no legal responsibility and over whom it exercised no control.

3. AOSHPI affirmatively alleges that any damages suffered by the plaintiffs were caused or contributed to, in whole or in part, by plaintiffs' own negligence, contributory fault or assumption of risk.

4. AOSHPI affirmatively alleges that plaintiffs' causes of action are barred, in whole or in part, by the applicable statutes of limitations.

5. AOSHPI affirmatively alleges that plaintiffs' causes of action are barred, in whole or in part, by the doctrine of laches.

6. AOSHPI affirmatively alleges that plaintiffs have waived their causes of action and/or are estopped from pursuing their causes of action by reason of waiver, release,



and the disclaimer language contained in their purchase contract.

7. AOSHPI affirmatively alleges that plaintiffs' causes of action are barred, in whole or in part, by plaintiffs' failure to mitigate their damages.

8. Plaintiffs claims under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961-68) violates AOSHPI's due process rights protected by the 5th and 14th Amendments of the United States Constitution and Article I, Section 7, of the Minnesota Constitution.

WHEREFORE, defendant A.O. Smith Harvestore Products, Inc. respectfully requests that the Court enter judgment in its favor dismissing plaintiffs' Amended Complaint on the merits and with prejudice, and award AOSHPI its costs and disbursements herein, along with any other relief the Court deems just and equitable.

Dated: January 25, 1994

/s/ Blake Shepard

Frederick W. Morris

Atty I.D. No. 75358

Blake Shepard, Jr.

Atty I.D. No. 161536

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DEFENDANT A.O. SMITH

HARVESTORE PRODUCTS, INC.

(Affidavit of Service Omitted in Printing)

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No.: 4-93-822 (JMR)  
Magistrate Franklin Noel

Marvin Klehr and  
Mary Klehr,

Plaintiffs,

v.

A.O. Smith Corporation and  
A.O. Smith Harvestore Products,  
Inc., Jointly and Severally,

Defendants.

RICO CASE STATEMENT OF  
MARVIN AND MARY KLEHR

Plaintiffs Marvin and Mary Klehr, by their attorneys, Charles A. Bird, 300 Third Avenue SE, Suite 305, Rochester, Minnesota; James Anthony Vick and Malcolm McCune, 300 James Robertson Parkway, Nashville, Tennessee; James Koby, 205 Fifth Avenue South, Suite 600, LaCrosse, Wisconsin, and William Mahler, 300 Third Avenue SE, Suite 301, Rochester, Minnesota, submit this RICO case statement in compliance with the Court's Order of January 24, 1994. As suggested by the court at the Motion hearing on January 24, 1994, Plaintiffs have, where practicable, cited to the Amended Complaint in responding to the questions of the court.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§1962(a), (b), (c), and/or (d).

Plaintiffs' Response:

The unlawful conduct of A.O. Smith Corporation ("AOS") and A.O. Smith Harvestore Products, Inc. ("AOSHPI") is in violation of 18 U.S.C. §§1962(a), and (c).

2. List each Defendant and state the alleged misconduct and basis of liability of each Defendant.

Plaintiffs' Response:

Defendants in this matter are AOS and AOSHPI. Plaintiffs have pleaded claims against each Defendant sounding in common law fraud, statutory fraud and misrepresentation, violation of 18 U.S.C. §1962(c) and violation of 18 U.S.C. §1962(a). Plaintiffs may seek to amend their pleading to allege a violation of §1962(d).

The gravamen of Plaintiffs' claim is that AOS and AOSHPI, formed an association-in-fact for the purposes of manufacturing, marketing, and selling farm equipment (see Plaintiffs' response to Question 8) to farmers across the United States, including the Plaintiffs. This "association in fact" has been plead in the alternative, as consisting of (1) AOS, AOSHPI and MVBA either alone or acting as part of Defendants Dealer Organization or (2) MVBA, either alone or acting as part of the Defendants "Dealer Organization". See Amended Complaint ¶s 4, 71, and 72.



Among the farm equipment sold by the association in fact was the "Harvestore" brand silo. AOS created and developed the "Harvestore" concept in approximately 1949 and marketed the silos through its dealer organization until 1961 when it formed AOSHPI as a wholly-owned subsidiary. At that time, AOS and AOSHPI began to share the task of marketing Harvestore silos, acting in combination and concert. Amended Complaint, ¶ 2. From the creation of the Harvestore system in 1949 up until at least 1989, AOS and from 1961 AOS and AOSHPI, acting in combination and concert, aggressively and fraudulently marketed the silos as "oxygen-free" and/or "oxygen limiting."<sup>1</sup>

Through a scheme utilizing the United States mails, interstate wires and other means, AOS and AOSHPI, acting in combination and concert, falsely represented to farmers across the United States, including the Plaintiffs, that Harvestore silos would exclude oxygen from ensiled feeds stored within. AOSHPI and AOS falsely represented to the farmers, including the Plaintiffs, that the "oxygen limiting" nature of the Harvestore system would properly preserve the feed as though it were stored in a fruit jar, free from the access of oxygen.

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<sup>1</sup> Although the terms suggest a difference, proofs at trial will demonstrate that AOS and AOSHPI defined the term "oxygen limiting" as a system which "prevents oxygen from coming into contact with the stored feed." Hence, "oxygen limiting" means "oxygen-free" in the parlance of Defendants. This issue is addressed in *Lollar v. AOSHPI*, 795 S.W.2d 441, 444 (MO App. 1990) (Attached as Exhibit A).

Notwithstanding the representations, AOS and AOSHPI had each conducted numerous and detailed studies during the period the Harvestores were being marketed and sold (1954-1982), which demonstrated that the silos were not "oxygen limiting" but were in fact oxygen-enhancing, and had other serious design flaws, thus promoting the deterioration of feeds stored within it. See Amended Complaint ¶ 26. Despite possessing detailed knowledge that its "oxygen limiting" and related representations were false, AOS and AOSHPI, acting together, through a scheme utilizing the mails and interstate wires, continued to make those representations to farmers across America, including the Plaintiffs, in what AOSHPI (with the express approval of co-conspirator AOS), proclaimed to be one of the most comprehensive mass marketing efforts in agri-business. See "Blue Chip Opportunity", p. 14. (Attached as Exhibit B.) Proceeds from the sale of Harvestore silos accomplished through this fraudulent scheme were invested by AOSHPI and AOS directly into the association-in-fact enterprise in order to (A) fund the continuing marketing and sale of Harvestore structures as "oxygen limiting" as that term is defined and used by Defendants feed storage structures, (B) funded post-sale misrepresentations to Plaintiffs and other farmers, including, but not limited to magazines, movies, and other literature, (C) funded efforts to conceal known product defects from Plaintiffs, other farmers similarly situated, MVBA and other Harvestore dealers, and (D) funded Agristor Credit Corporation, a separate, wholly owned subsidiary of AOS, whose sole business is the financing of the sale or lease of AOSHPI products (both to the farmer and to members of the Dealer Organization), the profits of which inure solely to the benefit of AOS.

3. List the alleged wrongdoers, other than the Defendants listed above, and state the alleged misconduct of each wrongdoer.

Plaintiffs' Response:

Plaintiffs are unaware whether other parties involved in the manufacture and marketing of Harvestore silos participated in the fraud of AOS and AOSHPI, or whether they were "wrongdoers" within the intended meaning of Question 3. Although Harvestore dealers such as MVBA and salesman such as Richard Deutsch repeated false representations authored by AOS and AOSHPI (and may have been negligent in doing this), Plaintiffs do not allege the dealers or individual salesmen shared AOS and AOSHPI's knowledge that the representations were false or that they are "wrongdoers" within the intended meaning of Question 3.

4. List the alleged victims and state how each victim was allegedly injured.

Plaintiffs' Response:

Victims of AOS' and AOSHPI's racketeering activity include, but are not limited to the following parties. To show the Court the widespread nature of the fraud, and its effect on interstate commerce, some of the victims are grouped by farm, with their geographic location identified:

Minnesota:

- i. Michael Guggisberg and Jean Guggisberg (Minnesota);

- ii. Raymond and Larry Kronebusch (Altura, Minnesota);  
 iii. Martin Tesch (Waldorf, Minnesota);  
 iv. Marvin Klehr and Mary Klehr (Shakopee, Minnesota);  
 v. Russ and Elaine Parker (Elgin, Minnesota);  
 vi. David and Lynne Kappahn (Bertha, Minnesota);  
 vii. Charles Hansen (Canby, Minnesota);  
 viii. Yonker-Nelson Farms (Nobles County, Minnesota);

Colorado:

- ix. Robert W. Korf and Minnie Korf (Colorado);  
 x. Raymond and Joyce Boyd (Morgan County, Colorado);  
 xi. Alfred and Martha Keller (Colorado);  
 xii. Richard and Carol Kallsen (Colorado);

Florida:

- xiii. Suber Cattle Company (Florida);

Georgia:

- xiv. Tommy Jordan (Georgia);

Idaho:

- xv. Burdette and Charlotte Branscum (Bonners Ferry, Idaho);

Indiana:

- xvi. Warren and Francille Colglazier, (Mitchell, Indiana);  
 xvii. Bennett F. Olsson and Janet Lou Olsson, Circle J Dairy, Inc. (Indiana);



Iowa:

- xviii. Darrel and Donna Souhrada (Cresco, Iowa);

Michigan:

- xix. John Gross and Norma Gross (Genesee County, Michigan);  
xx. Greg Mohr, Barbara Mohr and Walter Mohr, Mohrland Farms (Mayville, Michigan);  
xxi. Dale H. Myers, Ila Myers and Allen D. Myers (Brown City, Michigan);  
xxii. Arthur Thiss and Molly Thiss (Coopersville, Michigan);  
xxiii. Reginald VanSickle and Merle VanSickle, West Marion Dairy (Deckerville, Michigan);

Missouri:

- xxiv. Wade Lollar (Missouri);

Nebraska:

- xxv. Gary C. Frerichs and Diane L. Frerichs (Nebraska);  
xxvi. Roland Anderson (Nebraska);

New York:

- xxvii. Norman and Gladys Ashland (Watertown, New York);  
xxviii. Eugene Barber and Art and Alice Walters (Casenovia, New York);  
xxix. Tom Trinder (New York);

North Dakota:

- xxx. Norman and Darlene Stein (Mandan, North Dakota);  
xxxi. Edward and Belle Krank (Morton County, North Dakota);

South Dakota:

- xxxii. Ronald and Geraldine Scharffenberg (Bridgewater, South Dakota);

Tennessee:

- xxxiii. Frey Dairy (Tennessee);  
xxxiv. James Saylor and Kaaren Saylor (Bedford County, Tennessee);  
xxxv. William Dayon Taylor (Tennessee);  
xxxvi. Brooks Farms (Maury County, Tennessee);  
xxxvii. Ed and Charles Taylor (Lincoln County, Tennessee);  
xxxix. Warner Ross (Toone, Tennessee);  
xl. Joe and Wilma Wagner (College Grove, Tennessee);  
xli. David and Wayne Hill--Hill Bros Dairy (Lincoln County, Tennessee);

Texas:

- xlii. S.W. Applewhite II (Texas);

Wisconsin:

- xliii. John and Barb Chitwood (Blue River, Wisconsin);  
xliv. Achiel and Anitta D'Huyvetter (Neillsville, Wisconsin);  
xlv. Steven and Susan Pluemer (Potosi, Wisconsin).

Through schemes of mail and wire fraud AOS and AOSHPI disseminated to each of the victims representations that the Harvestore silo was "oxygen limiting." Each victim was injured by paying substantial sums to purchase or lease a Harvestore silo based upon this representation, which was false. The specific injuries suffered by each victim to their

livestock operation, in addition to the purchase price, resulted from feeding the oxygen and heat-damaged ensiled feed to their livestock. There was a loss of feed and farm production in every case. Plaintiffs' damages are discussed in greater detail in response to ¶15, *infra*.

**5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:**

- a. List the alleged predicate acts and the specific statutes which were allegedly violated;**

Plaintiffs' Response:

- i. Mail fraud in violation of 18 U.S.C. §1341;
  - ii. Wire fraud in violation of 18 U.S.C. §1343.
- b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;**

Plaintiffs' Response:

Plaintiffs are unsure of the meaning which the court gives to the phrase "participants in the predicate acts." Those liable for commission of the predicate acts are AOS and AOSHPI.

A description of AOS and AOSHPI's fraudulent scheme is found in Plaintiffs' Response to ¶2, *supra*.

Mail Fraud. Plaintiffs are unable to attach precise dates to all of AOS' and AOSHPI's use of the mails for the purpose of executing their fraudulent scheme. Their use of the mails included, however, the specific acts listed in the Amended Complaint at ¶s 10, 15, 16, and 63 and also included the following:

- i. Distribution to farmers of "Harvestore System Farming" (nee "Harvestore Farmer"), a magazine that contained the fraudulent "oxygen limiting" representation or was used in executing the scheme that led to presentation of this fraudulent representation on at least five occasions each year since at least 1979. See Dealer Management Guide 430.1, Exhibit F. AOSHPI admits that Harvestore Systems Farming was mailed five times a year to more than 200,000 customers, prospects, and individuals influential in local farming communities across the country. (Exhibit B, p. 14.) Plaintiffs, and the other victims identified under Question 4, were among the over



200,000 recipients of these fraudulent mailings.

- ii. Transmittal of information by AOSHPI to Dave Brown & Associates (AOSHPI public relations agency and publisher of Harvestore Systems Farming magazine) on one or more occasion each year from at least 1972- 1986. This information was included in the Harvestore Farmer and/or Harvestore Systems Farming magazine and contained the fraudulent "oxygen limiting" representation or was used to execute the scheme that led to dissemination of that representation.
- iii. Transmittal of sales literature and/or sales aids (including films) between AOSHPI and authorized Harvestore system dealers, including MVBA, that contained the fraudulent "oxygen limiting" representation or was used in executing the scheme that led to presentation of this fraudulent representation on at least one occasion in each year from 1970 - 1990.
- iv. Transmittal of sale literature and proposed sales literature containing the fraudulent "oxygen limiting" representation between AOS and AOSHPI on one or more occasion each year for the years 1970 through 1990 (AOS' corporate policy required AOS

review and approval of all AOSHPI promotional materials). Transmittal of these materials by mail for review by AOS was integral to the execution of the fraudulent scheme.

- v. Dissemination by both AOS and AOSHPI of coupons to farmers throughout the country, from at least 1961 through 1989, which caused farmers to fill them out and mail them to AOS and/or AOSHPI so that AOS and/or AOSHPI could mail the farmers promotional literature (including literature containing fraudulent representations), or dispatch an AOSHPI-trained salesman. An example of such a coupon is attached to this submission as Exhibit C. Plaintiffs believe AOSHPI will admit receiving one or more of these coupons through the mails in every year from 1972 to 1989. See, also, Amended Complaint ¶s 10, 15, 16, and 63.
- vi. Distribution through the use of the mails of dealer training manuals to authorized Harvestore system dealers, including MVBA. Dealer Management Guide 610.1, Exhibit F.
- vii. Dissemination of interoffice memoranda between AOS and AOSHPI in furtherance of the fraudulent scheme. An example of such a memorandum is attached to this

submission as Exhibit D. See also ¶26 Amended Complaint.

- viii. Dissemination of research and development reports between AOSHPI and AOS in furtherance of the fraudulent scheme. An example of such a report is attached to this submission as Exhibit E. See also ¶26 Amended Complaint.
- ix. Transmittal of information relating to the securing of patents related to the Harvestore structures at least once each year from 1972 through 1986 by AOSHPI, and at least once per year from 1951-1960 by AOS.
- x. Receipt through the mail of Harvestore order forms each year from 1970- 1990. Dealer Management Guide 751.10, Exhibit F. AOS distributed the order forms to dealers by mail. Dealers mailed computer order forms to AOSHPI. D.M. Guide 710.1, Exhibit F.
- xi. Distribution through the mails of information including the fraudulent representations to Creswell, Munsell, Fultz and Zirbel, Inc. ("CMF&Z"), that was used to create Harvestore advertising containing the fraudulent representations, at least once each year from 1977-1981.

- xii. Distribution through the mails of information including the fraudulent representations to Miller Meester Advertising, Inc., that was used to create Harvestore advertising containing the fraudulent representations, at least once each year from 1981 and thereafter.

- xiii. Maintenance of an Electronic Mailing System for the express purpose of mailing advertising and other materials, which items contained false representations. D.M. Guide 440.1, attached as Exhibit F.

Wire Fraud. Plaintiffs' wire fraud allegations are based upon the use of interstate telephone lines. Plaintiffs are unable to identify each date AOS and AOSHPI used or caused the telephone lines to be used in furtherance of their fraudulent scheme. Each wire transmission related to information used to further the dissemination of fraudulent representations to Plaintiffs and other farmers throughout the country regarding the "oxygen limiting" capabilities of the Harvestore system, to disseminate information that established the falsity of those representations and AOS' and AOSHPI's intimate knowledge of that falsity, or to make other communications integral to execution of the fraudulent scheme. Specific uses of telephone lines presently known to the Plaintiffs include:

- i. Use of telephone lines by MVBA and other Harvestore dealers, solicited by AOSHPI, to use either telephone or telefax for ordering Harvestore silos from AOSHPI. D.M. Guide 730.1, Exhibit F.



- ii. Use of telephone lines by AOSHPI and MVBA to schedule shipment dates for Harvestore silos;
- iii. See also ¶66 Amended Complaint;
- iv. Use of the telephone lines to order from A.O. Smith Corporation (PSD) the Harvestore System Sales Training Kit and Harvestore System Training Coordinator's Guide; which contain the false "oxygen limiting" representation. (See DM Guide 610.1) and Order forms for silos. (See D.M. Guide 751.1), Exhibit F.

c. **If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;**

Plaintiffs' Response:

Fraudulent representations regarding the "oxygen limiting" qualities of Harvestore silos reached the Plaintiffs in several ways: through direct, oral statements by AOSHPI-trained salespersons Ben Johannes and Richard Deutsch, through AOSHPI-authored and AOS-approved promotional

literature, and through AOSHPI-produced and AOS-approved promotional films.

Each representation was that Harvestore silos were "oxygen limiting" and would protect ensiled feeds from contact with oxygen, and that this "oxygen limiting" feature would provide collateral benefits, including but not limited to better feed preservation, better feed quality, and more palatable feed.

Oral representations were received from AOSHPI-trained salesperson Richard Deutsch on an ongoing basis from July 1973 until July 15, 1974, when the Plaintiffs purchased their Harvestore system. Oral representations were made during 6-8 personal visits to the Plaintiffs' farm and during "farm tours" —tours led by Richard Deutsch of farms which had Harvestore silos. See also ¶11 Amended Complaint.

The specific films, promotional literature, and advertisements which Plaintiffs saw and relied upon before the sale are described with particularity at ¶10 Amended Complaint. The films promotional materials and advertisements relied upon after the sale are described with particularity at ¶s 15 and 16 Amended Complaint. Other fraudulent information moving in the mails and by interstate wires, not relied upon by Plaintiffs, but relied upon by other victims, is set out at ¶s 63 and 66, Amended Complaint.

Some of the literature was received through the mail and some was delivered by hand by Richard Deutsch. Identical or substantially similar literature was furnished to each of the victims identified in ¶4, supra.

- d. State whether there has been a criminal conviction for violation of the predicate acts;

Plaintiffs' Response:

Plaintiffs are unaware of any criminal convictions for violations of predicate acts. AOS and/or AOSHPI may be aware of such convictions.

- e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

Plaintiffs' Response:

Plaintiff is unaware of civil judgments in regard to mail or wire fraud, but a number of victims identified in ¶4, supra, have obtained civil fraud judgments against AOSHPI based on the identical fraudulent "oxygen limiting" representation which in almost every instance were disseminated through the use of the mails. Included among the victims securing a judgment were the following:

- i. First National Bank of Louisville v. Brooks Farms, 821 S.W.2d 264 (TN 1991);
- ii. Keller v. A.O. Smith Harvestore Products, 819 P.2d 69 (Colo. 1991);
- iii. Korf v. A.O. Smith Harvestore Products, Inc., 917 F.2d 480 (10th Cir. 1990);

- iv. Kappahn v. A.O. Smith Corp. et al., Carver Co. Minnesota District Court, File #85-20280;

- v. Lollar v. A.O. Smith Harvestore Products, Inc., 795 S.W.2d 441 (MO App. 1990);

- vi. Olsson v. A.O. Smith Harvestore Products, Inc., 656 F.Supp. 644 (SD Ind. 1987);

- vii. Agristor Leasing v. Saylor, 803 F.2d 1401 (6th Cir. 1986) retried and appealed at Saylor v AOSHPI, 872 F.2d 1028;

- viii. Agristor Leasing (v. Taylor) v. A.O. Smith Harvestore Products, Inc., 869 F.2d 264, 268 (6th Cir. 1989);

- ix. Kronebusch et al v. A.O. Smith Harvestore Products, Inc., 488 N.W.2d 490 (1992);

- x. Souhrada et al v. A.O. Smith Harvestore Products, Inc., unpublished, on appeal (1990);

- xi. Buller v. AOSHPI, MN Court Appeals, unpublished decision, October 13, 1993, (Petition for Review granted) attached as Exhibit G.;



- xii. Dubbe v. AOSHPI, 399 N.W.2d 644, 646 (MN App. 1987). (Fraud found but no cause on damages.)

Numerous other cases have been settled for substantial sums, the specific amounts of such settlements, at the insistence of Defendants, cannot be disclosed and must be kept confidential.

- f. **Describe how the predicate acts form a "pattern of racketeering activity";**

Plaintiffs' Response:

The predicate acts described in response to Question 5(b) revolve around a common plan by Defendants to perpetrate a fraud upon the nation's farming industry on a continual basis from at least 1954 to 1991, utilizing the wholly false representation that a Harvestore silo is "oxygen limiting." Each of the delineated predicate acts are related to achieving the result of the fraudulent scheme or common plan -- sale of Harvestore silos based on its highly touted ability to prevent oxygen from contacting the feed stored within it.

These predicate acts touch almost every aspect of the process leading up to consummating the sale of a Harvestore silo, including design, manufacturing, marketing, and processing the sales order. More than 77,000 silos have been sold. As important, the predicate acts are not isolated by time or geography. These predicate acts, numbering in the thousands, have been committed on a continual basis utilizing the same methodology over a period spanning at least 37 years and similarly affected a single group of victims -- the farming

industry of America. AOSHPI (with the approval of AOS) employs and instructs authorized dealers and salesman in a five step sales process which results in consummation of the fraud. Exhibit B, p. 12. The sales training materials are ordered from AOS through the mails. D.M. Guide 610.1, Exhibit F.

In short, the length over which this fraudulent pattern of activity has extended, coupled with its common plan, design, methods of commission, results to the farmers and victims, is sufficient to bring it within the purview of Title IX.

- g. **State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.**

Plaintiffs' Response:

Yes. AOS and AOSHPI planned to sell Harvestore silos to as many American farmers as possible, using the fraudulent "oxygen limiting" representation as part of "one of the most comprehensive marketing programs in all of agri-business." See Plaintiffs' responses to ¶s 2, 3, and 5(f), and Exhibit B, pp. 2, 8, 10, 12, 13, and 14.

6. **Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:**
- a. **State the names of the individuals, partnerships, corporations, associations, or other legal entities,**

which allegedly constitute the enterprise;

Plaintiffs' Response:

The enterprise consists of an association-in-fact between AOS, AOSHPI and MVBA (acting alone or as part of Defendants Dealer Organization) or alternatively, MVBA, acting alone, or as part of Defendants "Dealer Organization." See Amended Complaint ¶s 4, 71, and 72.

- b. Describe the structure, purpose, function and course of conduct of the enterprise;

Plaintiffs' Response:

As an association-in-fact, the enterprise had no distinct legal identity or formalized "function" or structure." Its purpose and course of conduct was to manufacture, market and sell farm equipment, including Harvestore brand silos, "Slurrystore" Manure Processing Systems, The Harvestore Wa-Ro-Matic, various types of augers, grain weighers, roller mills, mineral meters, supplement meters, flight conveyors, belt conveyors, electronic scales, belt feeders, Super Shuttle I & II, cycling feeders, Rotary Hog Feeder, various types of pumps, Slurrystore spreaders, control centers, feed bunk floors, standby alternators, grain reconstituters and grinder-blowers. MVBA also was involved in the lawful sale of semen for breeding livestock.

AOS, founded well over a century ago, has been in the agricultural equipment business for decades, but had legitimate business as well. Amended Complaint ¶2. AOS conceived of the "dealer network" aka "dealer organization" which was a predecessor of and led directly to the association-in-fact enterprise. See Amended Complaint ¶s 4, 10(b)(1), 11(f), 15, 15(q), 15(s), 15(w), 15(bb), 16(e), 16(g), 16(i), 26 (at p. 27 Amended Complaint), 39, 44, 56, 63(f)(36), 71, and 72. Following AOS' incorporation of AOSHPI in 1961, AOS transferred much operational responsibility for agricultural equipment to AOSHPI. AOS, however, maintained critical roles in the enterprise. As a matter of fact, among other things, AOS reviewed and approved all AOSHPI's promotional material (including material containing fraudulent representations).

AOSHPI, at some point following its incorporation, assumed responsibility for manufacturing the silos and for maintenance and improvement of the already-existing dealer distribution network. With the help of AOS, AOSHPI further developed the "comprehensive marketing program" of which it later would boast. AOS and AOSHPI developed the direct mail program together and shared responsibilities for that program. AOSHPI trained dealer salespersons, including salespersons employed by MVBA.

MVBA was the member of the enterprise responsible for most face-to-face contact with prospective farm equipment purchasers, and was responsible for "closing" sales. Its AOSHPI trained salespersons were well-versed in AOS/AOSHPI promotional materials and programs.



- c. **State whether any Defendants are employees, officers or directors of the alleged enterprise;**

Plaintiffs' Response:

No.

- d. **State whether any Defendants are associated with the alleged enterprise;**

Plaintiffs' Response:

Plaintiffs assume the Court used the term "associated with" in the manner it is used in 18 U.S.C. §1962. In that context, Plaintiffs answer "yes." Plaintiffs invite the Court to clarify the meaning of the phrase "associated with" if Plaintiffs have not adequately addressed the Court's concerns with regard to ¶6(d).

- e. **State whether you are alleging that the Defendants are individuals or entities separate from the alleged enterprise, or that the Defendants are the enterprise itself, or members of the enterprise;**

Plaintiffs' Response:

Plaintiffs allege the Defendants are separate from the RICO enterprise. Plaintiffs are unsure of the meaning the Court gives to the phrase, "members of the enterprise." Again, the enterprise is, as alleged in the alternative, an

association-in-fact of AOS, AOSHPI and MVBA, and, to that extent, Defendants are "members" of the enterprise.

- f. **If any Defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such Defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.**

Plaintiffs' Response:

Again, Plaintiffs are unsure of the meaning of the phrase, "members of the enterprise." Plaintiffs allege Defendants are the perpetrators of the racketeering activity, using MVBA, the Dealer Organization and the enterprise itself as the conduit, or "passive instrument" of this activity. Plaintiffs do not allege Defendants are the enterprise.

7. **State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.**

Plaintiffs' Response:

Plaintiffs do not allege that the "pattern of racketeering activity" has merged with the "enterprise" into a single entity,

and allege the enterprise is distinct from the pattern. Plaintiffs are unsure of the Court's intent in ¶7 and do not understand conceptually how a pattern of actions could "merge into" an enterprise. Hence, Plaintiffs are unable to further describe their disavowal of such an allegation, but invite further clarification from the Court

8. **Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.**

#### Plaintiffs' Response:

Plaintiffs incorporate by reference their response to ¶s 2, 3, 5, and 6, supra.

The racketeering activity of AOS and AOSHPI is distinct from the usual and lawful activities of the enterprise of which AOS and AOSHPI were a part. See Amended Complaint, ¶s 2 and 3. In addition to manufacture, marketing and sales of Harvestore silos, the usual, daily activities of the enterprise include the manufacture, marketing and sale of "Slurrystore" Manure Processing Systems, The Harvestore Wa-Ro-Matic, various types of augers, grain weighers, roller mills, mineral meters, supplement meters, flight conveyors, belt conveyers, electronic scales, belt feeders, Super Shuttle I & II, cycling feeders, Rotary Hot Feeder, various types of pumps, Slurrystore spreaders, control centers, feed bunk floors, standby alternators, grain reconstituters and grinder-blowers.

Each of these items was manufactured and marketed by AOS and/or AOSHPI and was available for sale at and sold by MVBA.<sup>2</sup>

The pattern of racketeering activity, on the other hand, is limited to the creation and dissemination of fraudulent representations about the properties of the Harvestore brand silos (using United States mails and interstate wires to execute the fraud), in connection with the marketing of those silos.

AOS and AOSHPI alone were knowing participants in the fraudulent scheme. AOS originally conceived and developed Harvestore silos in the late 1940's, and was the original author of the false representation that the silos excluded oxygen. AOS was also the party which conducted the original research proving the representation false.

Sometime after AOS incorporated AOSHPI in 1961, AOSHPI assumed responsibility for manufacturing Harvestore silos. AOSHPI became the primary author of post-1961 incarnations of the "oxygen limiting" representation and collateral fraudulent representations. The Defendants, however, worked together to execute the fraudulent scheme. AOS reviewed and approved all of AOSHPI's sales and promotional materials, including specifically, materials containing the fraudulent representations. AOS and AOSHPI both commissioned and reviewed scientific studies which demonstrated the falsity of the "oxygen limiting" representation, and the Defendants shared with each other the results of those studies. Amended Complaint ¶26. AOSHPI

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<sup>2</sup>MVBA also sold farm equipment and livestock semen outside of the enterprise. Amended Complaint ¶4.



assumed responsibility for the AOS-created dealer network and trained salespersons. This training included training in the false "oxygen limiting" representation. AOS and AOSHPI shared responsibility for the direct mail program, which included the dissemination of fraudulent representations.

MVBA and the Dealer Organization were unwitting pawns in the fraudulent scheme. Its salespersons were trained in the fraudulent representations by AOSHPI and presented them to purchasers, including the Plaintiffs. MVBA, however, did not know the representations were false.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

Plaintiffs' Response:

As an association-in-fact without legal identity, the RICO enterprise had no bank account, assets or bottom line and could not directly participate in the fruits of the racketeering activity. AOS and AOSHPI were the primary beneficiaries of the pattern of racketeering activity, and they used those fruits to perpetuate the enterprise. See Plaintiffs' response to ¶s 2 and 11(b). If the enterprise is determined to be MVBA or the Dealer Organization, there was a profit on the sale of the silos, but, again the Defendants were the primary beneficiaries of the pattern of racketeering activity.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

Plaintiffs' Response:

The Harvestore silos were sold nationally. Manufactured either in Wisconsin or Illinois, they were shipped from the place of manufacture to the purchasing farm, in this and most instances, across state lines. (Victims are from many states. See Plaintiffs' response to ¶4.)

Moreover, the products of the farms purchasing Harvestore silos often moved in interstate commerce. These products were often of inferior quality because they were the result of the feeding of oxygen and heat-damaged feed.

11. If the Complaint alleges a violation of 18 U.S.C. §1962(a), provide the following information:

- a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt.

Plaintiffs' Response:

Although MVBA received a profit as a result of, and incidental to, AOS and AOSHPI's pattern of racketeering, the primary beneficiaries were AOSHPI and AOS.

- b. Describe the use or investment of such income.

Plaintiffs' Response:

Income was mingled with the general funds of AOS and AOSHPI, where it was invested in the enterprise. Such uses include, inter alia: development of promotional literature containing fraudulent representations; publication of that literature, dissemination of the literature; maintenance of mailing lists to facilitate that dissemination; training of dealer-employed salespersons; creation of films containing fraudulent representations; enhancement of the dealer network and manufacture of Harvestore silos sold by MVBA. See also Amended Complaint ¶79.

12. If the Complaint alleges a violation of 18 U.S.C. §1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

Plaintiffs' Response:

Not applicable.

13. If the Complaint alleges a violation of 18 U.S.C. §1962(b), provide the following information:

- a. State who is employed by or associated with the enterprise.

- b. State whether the same entity is both the liable "person" and the "enterprise" under §1962(c).

Plaintiffs' Response:

Not applicable.

14. If the Complaint alleges a violation of 18 U.S.C. §1962(d), describe in detail the alleged conspiracy.

Plaintiffs' Response:

Although Plaintiffs have not alleged a violation of §1962(d), they may petition the Court to allow such a claim. For that reason, Plaintiffs respond to ¶ 14.

At all times during the perpetration of the fraudulent scheme, AOS and AOSHPI acted in combination and concert. Concerted activity includes both authorship and dissemination of fraudulent representations, as described in detail in Plaintiffs' responses to ¶s 2, 3, 5, and 8 supra.

15. Describe the alleged injury to business or property.

Plaintiffs' Response:

Plaintiffs were injured in the following particulars:



- i. They expended monies for a Harvestore silo which did not preserve feed as represented.
- ii. They incurred increased costs as a direct and proximate result of their use of their Harvestore silos, including increased feed costs, increased veterinary costs and incidental expenses associated therewith.
- iii. They suffered decreased milk production (lower quality and quantity) as a result of feeding oxygen and heat-damaged feed.
- iv. Their herd suffered breeding problems, general unthrifty physical condition, higher than normal cull rates and increased incidence of disease.
- v. The production and health problems engendered by the use of the Harvestore dramatically and adversely impacted the economic performance of Plaintiffs' dairy operation.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

Plaintiffs' Response:

Plaintiffs purchased their Harvestore silos in reliance upon the fraudulent representations which were the heart of AOS

and AOSHPI's fraudulent scheme, and suffered damages as a result. AOS and AOSHPI used the U.S. mails, interstate wires, and proceeds from previous fraud victims to execute the fraud upon Plaintiffs. In addition, after the sale, the Defendants continued to fraudulently represent the silo and the source of problems associated with its use, while at the same time, actively concealing their own research demonstrating the essential product design flaws. Amended Complaint ¶26. Plaintiffs, as a result, were prevented from learning the truth about product design, searched vainly elsewhere for a solution to on-farm problems and continued to use the silo to their detriment until 1991.

17. List the damages sustained by reason of the violation of §1962, indicating the amount for which each Defendant is allegedly liable.

Plaintiffs' Response:

Plaintiffs are unable to ascertain their damages at the present time, but they are well in excess of \$50,000 and will likely be in excess of \$1,000,000. AOS and AOSHPI are jointly and severally liable for all Plaintiffs' damages. Plaintiffs damage analysis from Dr. Michael Behr is attached as Exhibit H. This report will be updated before trial.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

Plaintiffs' Response:

None.

**19. List all pendent state claims, if any.**

Plaintiffs' Response:

See Counts I, II, V - IX Amended Complaint. Intentional Misrepresentation, Negligent Misrepresentation, False Advertising, Consumer Fraud, Misrepresentation of Quality, and Deceptive Trade Practices.

**20. Provide any additional information that you feel would be helpful to the Court in processing your RICO claim.**

Plaintiffs' Response:

**A. Other Judicial Decisions**

Several judicial decisions deal with issues similar to those presented here, and claims against AOS and/or AOSHPI. In particular, two decisions from the U.S. District Courts in Michigan have import. These decisions are Thiss v. A.O. Smith Corporation and A.O. Smith Harvestore Products (U.S. District Court W.D. Michigan, Order of Richard A. Enslen, U.S. District Judge, June 29, 1993) attached as Exhibit I; and Mohr v. A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc. (U.S. District Court E.D. Michigan, Order of March 25, 1993 by Robert H. Cleland, U.S. District Court), attached as Exhibit J. In these two lawsuits, these same Defendants made motions on the grounds of statute of

limitations, as well as insufficient allegations regarding a RICO enterprise, AOS' liability under RICO, and constitutionality of RICO. In each instance, the U.S. District Court denied Motions for Summary Judgment.

In addition, Plaintiffs believe that the Court will be enlightened by a review of the following cases:

- i. Lollar v. AOSHPI, 795 S.W.2d 444 (MO App. 1990) attached as Exhibit A. "The internal documents of AOSHPI showed that AOSHPI knew for many years the existence of problems of oxygen intrusion into the Harvestore structures and the resulting problems oxygen caused on the stored feed." Id. at 449.
- ii. Agristor Leasing (v. Taylor) v. AOSHPI, 869 F.2d 264 (6th Cir. 1989) attached as Exhibit K. "...the reality, as AOSHPI knew, was that grain stored in Harvestore silos was subject to excessive spoilage and secondary fermentation because of design flaws." Id. at 268-269.
- iii. First National Bank of Louisville v. Brooks Farms, 821 S.W.2d 925 (Tenn. 1991) attached as Exhibit L;
- iv. Memorandum and Order, Honorable John Gowan, Kronebusch v. AOS, June 1991, attached as Exhibit M. "Defendants knew of the limitations of the Harvestore silo in



preventing oxygen from coming into contact with stored feed, and knew of the potential its product had to cause herd damage and diminish milk production in dairy enterprises, yet they persisted in an advertising and marketing campaign over many years stressing product virtues they knew were false, all the while shielding from the public the information which undermined these claims." *Id.* at page 17, paragraph 6.

- v. First National Bank of Louisville v. Brooks Farms, (Post-trial Memorandum of Honorable William B. Cain, November 2, 1988) (*Id.* at page 6) (guilty of unmitigated fraud), attached as Exhibit N.
- vi. Buller v. AOSHPI, MN Court of Appeals (unpublished October 13, 1993) (Petition for Review Granted) attached as Exhibit G. "The trial court found that AOSHPI knew as early as 1953 that the Harvestore silos did not perform as advertised, that they were not airtight and that they allowed spoilage. Long before appellants purchased the silos, AOSHPI knew some of their representations about the silos performance were false." *Id.* at 10.

Plaintiffs would also refer to the Court to those other decisions which have been previously referred to herein at page 14.

#### B. New York Consent Decree

In addition, in or about October of 1991, the State of New York brought an action against AOSHPI alleging violation of various New York regulatory and consumer protection statutes. The action was brought as a result of the New York Attorney General's investigation revealing that Harvestore silos were not "oxygen limiting" and did not perform as represented.

Within days, AOSHPI entered a Consent Order and Judgment with the State of New York, which established a program of arbitration for compensating victims of AOSHPI's acts and sharply limited the representations AOSHPI could make in connection with the sale of Harvestore silos. Under the Consent Order, AOSHPI is enjoined from representing that the silos are "oxygen-free" and requires that any "oxygen limiting" representation be followed by an express definition of the term substantially different from the one previously used. The 59-page Consent Order and Judgment recites, of course, that AOSHPI denied wrongdoing.

#### C. Ohio Class Action

Finally, this Court should be aware that a Class Action lawsuit has been initiated in the United States District Court for the Southern District of Ohio, Western Division, entitled Stanley Ilhardt, et al. v. A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc. as case number C-1-92-635. The putative Plaintiffs moved for certification of the class and the motion was orally argued before the Honorable Herman J. Weber on August 6, 1993, in Cincinnati, Ohio. No ruling has

yet been made by the Court. Defendants in this lawsuit, are the same Defendants in Ilhardt. They have vigorously contested class action treatment alleging, among other things, that each lawsuit must be handled individually, by the courts in which they are pending or may be filed.

Dated this 11th day of February, 1994.

Respectfully submitted,

BIRD AND JACOBSEN

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(Attached Exhibits Omitted in Printing)

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No. 4-93-822 (JMR)

MARVIN KLEHR and MARY KLEHR,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCTS,  
INC., and  
A. O. SMITH CORPORATION,

Defendants

AFFIDAVIT OF WILLIAM G. OLSON

Dr. William G. Olson, being first duly sworn, states and alleges as follows:

1. My name is William G. Olson. I am an Associate Professor of Clinical and Population Sciences at the University of Minnesota Veterinary School, St. Paul campus. I have a doctor of veterinary medicine degree and a Ph.D. in Dairy Science from the University of Minnesota. As part of my duties with the University of Minnesota, I coordinate the Nutrition Program at the Veterinary School and I visit and evaluate dairy farms on a regular basis. Attached hereto is a true and accurate copy of my curriculum vitae.

2. I have visited and inspected the dairy farming operation, the dairy animals, the 25 x 80 Harvestore silo and the feed stored in the 25 x 80 Harvestore silo on the dairy farm of Marvin Klehr and made observations as follows:

A. On March 22, 1991, I first visited the dairy farm of Marvin Klehr. At this visit I performed a general overview of the dairy farming operation. At the time of the visit Mr. Klehr was using his 25 x 80 Harvestore structure to store forages which he fed to his dairy cattle. I reviewed generally with Mr. Klehr his milk production history and DHIA records since he began using the 25 x 80 Harvestore structure. I observed Mr. Klehr's dairy animals to be in average to poor body condition, with rough hair coats. The 25 x 80 Harvestore structure was structurally sound with no apparent leaks. The door was pressurized when we opened it. I observed the feed in the 25 x 80 Harvestore silo to be dark, caramelized, with some mold and a bad smell for ensiled alfalfa. Dark, caramelized, or molasses smelling feed is indicative of heating of the feed while stored in the Harvestore structure. A sample of this feed was submitted for analysis. The feed sample reported a 19% ADIN. This level of ADIN is the result of heating of the feed while stored in the Harvestore silo. The heating of the feed is the result of exposure of the feed to oxygen while stored in the Harvestore structure. Heating of feed has detrimental effects on the nutritional value of the stored feed, among them the binding of proteins

and carbohydrates making them undigestible and nutritionally unavailable to the animal.

B. On April 15, 1991, I revisited the dairy farm of Marvin Klehr. At that time, the access door was removed from the 25 x 80 Harvestore structure and we videotaped the feed on the interior of the structure. In the interior of the structure there was a cavity in the feed 15 to 20 feet high. The feed in the structure was dark colored. The interior walls of the feed cavity were covered with various colors of mold. Mold is the result of oxygen access to the feed while stored in the Harvestore structure. Mold is detrimental to the nutritional value of the feed on which the mold is growing. Mold and its presence in feed can adversely affect milk production and cattle health due to (1) poor palatability and (2) possible buildup of toxins in the feed.

C. On approximately April 22, 1991, I returned to the Klehr farm. The access door was again removed from the 25 x 80 Harvestore structure. On this occasion I brought better video and lighting equipment to observe the feed in the interior of the Harvestore structure. Again the feed in the interior of the Harvestore structure was dark colored and covered with various colors of mold.

D. On May 1, 1991, I visited the dairy farm of Marvin Klehr. Mr. Klehr had stopped

feeding his milking cows from the 25 x 80 Harvestore structure.

E. During the course of my visits, I was advised that Mr. Klehr began feeding from the 25 x 80 Harvestore structure in early June 1975. I was advised by Mr. Klehr that over the period of time that he fed his dairy cattle from the 25 x 80 Harvestore structure that his cows exhibited various symptoms including dull eyes, rough hair coat, thin body condition, occasions of lowers feed intake, high somatic cell problems, lengthened calving interval, reduced conception rate and, increased infections. I was advised by Mr. Klehr that during parts of each year that Mr. Klehr used the 25 x 80 Harvestore structure, that feed from the 25 x 80 Harvestore structure had a molasses or caramelized smell and color with some visible mold present in the feed. Although I saw large amounts of mold on the interior of the structure on the occasions I looked into the cavity, when we ran the feed out of the unloader, the mold could hardly be seen because it had been chopped and mixed with the feed by the operation of the bottom chain unloader. Mr. Klehr stated that the feed that we ran out of the unloader on these occasions looked the same as the feed that he had removed and fed over the years from the 25 x 80 Harvestore structure. Based upon Mr. Klehr's description of the feed during the years that he fed from the 25 x 80 Harvestore structure, it is my opinion that the feed was not protected from the access of oxygen and was damaged.



F. On June 26, 1992, I visited the dairy farm of Marvin Klehr. I talked with Mr. Klehr regarding his feeding program. Mr. Klehr had not fed his dairy cows from the 25 x 80 Harvestore structure for more than one year. Since that time, Mr. Klehr had been feeding chopped based hay in the place of the forage that he had been feeding from the 25 x 80 Harvestore structure. I discussed with Mr. Klehr his herd's milk production since he had stopped feeding from the 25 x 80 Harvestore structure. Mr. Klehr stated and his DHIA records showed that his rolling herd average milk production had increased approximately 4000 lbs per cow since he stopped feeding from the 25 x 80 Harvestore structure. The body condition of Mr. Klehr's dairy cows was much improved over what it had been the year before and their hair coats were slick and shining. I was advised by Mr. Klehr that his dairy cattle's health was considerably better than it had been the year before and breeding problems had subsided.

4. I have discussed Mr. Klehr's dairy farming operation with Dr. Steve Kreuser, DVM, a veterinarian who treated Mr. Klehr's dairy cattle during the period that Mr. Klehr fed from the 25 x 80 Harvestore structure and to some extent since he stopped feeding from the 25 x 80 Harvestore structure. Dr. Kreuser's observations of the conditions and health of the dairy cattle were consistent with what I had been told by Mr. Klehr.

5. From my observations of Mr. Klehr's farming operation and discussion of his dairy farming practices with Mr. Klehr and Steve Kreuser, DVM, it is apparent that Mr. Klehr is an excellent dairy farm manager.

6. I have reviewed the damages report prepared by Dr. Michael Behr and, to some extent, the DHIA records of Marvin Klehr. Since the time Mr. Klehr stopped feeding his dairy cattle from the 25 x 80 Harvestore structure, milk production has increased in excess of 6000 pounds per cow, a level of increase far in excess of the level of increase of milk production that would be expected of dairy farmers generally. Since that time, the health and condition of Mr. Klehr's dairy cows has improved significantly.

7. Based upon my education, training, experience and knowledge of veterinary medicine, dairy science and nutrition, my review of Mr. Klehr's dairy farming operation, my review of Mr. Klehr's milk production for the period that he fed from the 25 x 80 Harvestore structure, and considering Mr. Klehr's obvious level of management ability, it is my opinion that over the period of time that he was feeding from the 25 x 80 Harvestore structure, Mr. Klehr's dairy cows did not produce milk at the level that they should have produced, did not produce milk at the level that they otherwise would have produced, and that Mr. Klehr suffered money damages as a consequence.

8. In the course of my profession, I have had occasion to visit many farms which had Harvestore structures and to investigate many complaints of farmers who were using, storing and feeding from Harvestore structures.

9. Based upon my training, education, experience and knowledge of veterinary medicine, animal science, and nutrition, my investigation of the Klehr farm, the description of the dairy cows and feed from the 25 x 80 Harvestore structure during the period that he fed from the 25 x 80 Harvestore structure, the level of milk production during the period that Mr. Klehr fed from the 25 x 80 Harvestore structure, the dramatic increase in milk production and improvement in health and condition of the cattle after Mr. Klehr stopped feeding from the 25 x 80 Harvestore structure, and my investigations of complaints of farmers using and feeding from Harvestore structures, it is my opinion that the feed stored in the 25 x 80 Harvestore structure was not properly preserved and was damaged, that this damage resulted in Mr. Klehrs' failure to reach the level of milk production that he otherwise would have produced had Mr. Klehr not been using and feeding from the 25 x 80 Harvestore structure, that feeding from the 25 x 80 Harvestore structure resulted in reduced animal health, reproductive efficiency, and body condition, and that Mr. Klehr's dairy farming operation, therefore, suffered substantial financial damages.

10. I have made an extensive review of research and development reports generated by A. O. Smith Corporation and A. O. Smith Harvestore Products, Inc., the manufacturers of Harvestore structures, inter and intra-office documents, memoranda, correspondence and research and development reports of A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation regarding the qualities and performance of the Harvestore structures dating back to the early 1950's. In addition, I have reviewed printed brochures and films produced and distributed by the manufacture which contain representations of the manufacturer regarding the supposed

quality and character of the Harvestore structures, particularly their supposed "oxygen-limiting" capability. Although Harvestore structures are now characterized as "oxygen-limiting", the explanation or definition applied to that characterization by the manufacturer is the same as the explanation of the "oxygen-free" characterization previously used by the manufacturer. Regardless of the characterization, Harvesters are represented as protecting the stored feed from the access of oxygen to the extent necessary to properly store and preserve feed.

11. It is my opinion, based upon my education, training, experience and knowledge of veterinary medicine, dairy science, nutrition, my investigation of complaints of farmers using, storing and feeding from Harvestore structures, my review of research and development reports and inter and intra-office documents, correspondence and reports regarding Harvestore structures and my review of Harvestore promotional materials, that Harvestore structures, including these manufactured in 1974, do not protect the stored feed from the access of oxygen and do not perform, store and preserve feed in the manner represented in their printed promotional materials and films and that this failure to protect the feed from oxygen creates a high probability of damage to the dairy animals, milk production of dairy farms, including the dairy farming operation of Marvin Klehr. It is further my opinion from my review of the research and development reports and the inter and intra-office memoranda and correspondence generated by A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation, that A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation have known for years, and prior to the time of the sale of the structure to Mr. Klehr in 1974, that the Harvestore structure,



particularly larger diameter structures including the 25 foot diameter structures as sold to Mr. Klehr, did not prevent the access of oxygen to the stored feed and did not perform, store and preserve feed as represented and knew that these failures created a high probability of damage to users of Harvestore structures. The documents and reports generated by A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation regarding the Harvestore structure demonstrate that the manufacturers were aware of the high probability of damage to the feed stored in the Harvestore structure and the adverse effects of such damage to the dairy animals.

Dated this the 20th day of April, 1994.

/s/ William Olson  
William Olson

(Attached Exhibit Omitted in Printing)

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No. 3:94-424

MARVIN KLEHR and MARY KLEHR,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCTS,  
INC., and  
A. O. SMITH CORPORATION,

Defendants.

AFFIDAVIT OF WILLIAM G. OLSON

Dr. William G. Olson, being first duly sworn, states and alleges as follows:

1. My name is William G. Olson. I am an Associate professor of Clinical and Population Sciences at the University of Minnesota Veterinary School, St. Paul campus. I received a Doctor of Veterinary Medicine degree from the University of Minnesota in 1966 and a Ph.D. in Dairy Science from the University of Wisconsin in 1972. As part of my duties with the University of Minnesota, I coordinate the Nutrition Program at the Veterinary School and I visit and evaluate dairy farms on a regular basis.

2. I have visited, inspected and reviewed the history of the dairy farming operation, the dairy animals, the 25 x 80 Harvestore silo and the feed stored in the 25 x 80 Harvestore silo on the dairy farm of Marvin Klehr and made observations as follows:

A. On March 22, 1991, I first visited the dairy farm of Marvin Klehr. At this visit I performed a general overview of the dairy farming operation. At the time of the visit Mr. Klehr was using his 25 x 80 Harvestore structure to store forages which he fed to his dairy cattle. I observed the feed in the 25 x 80 Harvestore silo to be dark, caramelized, with some mold and a bad smell for ensiled alfalfa. Dark, caramelized, or molasses smelling feed is caused by the heating of the feed while stored in the Harvestore structure. The heating of the feed is the result of microbial activity resulting from exposure of the feed to oxygen while stored in the Harvestore structure. Heating of feed has detrimental effects on the nutritional value of the stored feed, among them the binding of proteins and carbohydrates making them undigestible and nutritionally unavailable to the dairy cow.

B. On April 15, 1991, I revisited the dairy farm of Marvin Klehr. At that time, the access door was removed from the 25 x 80 Harvestore structure and we videotaped the feed on the interior of the structure. In the interior of the structure there was a cavity in the feed 15 to 20 feet high. The feed in the structure was dark colored. The interior walls of the feed cavity were covered with various colors of mold. Mold is the result of oxygen access to the feed while in the Harvestore

structure. Mold is detrimental to the nutritional value of the feed on which the mold is growing. Mold and its presence in feed can adversely affect milk production and cattle health due to (1) poor palatability; (2) possible buildup of toxins in the feed; and (3) reduced nutritional value of the feed.

C. On approximately April 22, 1991, I returned to the Klehr farm. The access door was again removed from the 25 x 80 Harvestore structure. On this occasion I brought better video and lighting equipment to observe the feed in the interior of the Harvestore structure. Again the feed in the interior of the Harvestore structure was dark colored and covered with various colors of mold.

D. On May 1, 1991, I visited the dairy farm of Marvin Klehr. Mr. Klehr had stopped feeding his milking cows from the 25 x 80 Harvestore structure.

E. During the course of my visits, I was advised that Mr. Klehr began feeding from the 25 x 80 Harvestore structure in early June 1975. I was advised by Mr. Klehr that over the period of time that he fed his dairy cattle from the 25 x 80 Harvestore structure that his cows exhibited various symptoms including dull eyes, rough hair coat, thin body condition, occasions of lowers feed intake, high somatic cell problems, lengthened calving interval, reduced conception rate and, increased infections. These symptoms, individually or in combination with one or more, can be caused by numerous factors, many of which are not related to the feeding of damaged or moldy feed. Milk production, in particular,



can be affected by many different factors, including, among others, disease and management. I was advised by Mr. Klehr that during parts of each year that Mr. Klehr used the 25 x 80 Harvestore structure, that feed from the 25 x 80 Harvestore structure had a molasses or caramelized smell and color with occasions of some visible mold and was generally warm to the touch. Although I saw large amounts of mold on the feed in the interior of the structure on the occasions, that I looked into the cavity in April 1991, when we ran the feed out of the unloader, the mold could hardly be seen because it had been chopped up and mixed with the feed by the operation of the bottom chain unloader. Mr. Klehr stated that the appearance of the amount of mold in the feed that we ran out of the unloader on these occasions was similar to the amount of mold that he had seen on occasions in the feed that he had removed and fed over the years from the 25 x 80 Harvestore structure.

3. I have discussed Mr. Klehr's dairy farming operation with Dr. Steve Kreuser, DVM, a veterinarian who treated Mr. Klehr's dairy cattle during the period that Mr. Klehr fed from the 25 x 80 Harvestore structure and to some extent since he stopped feeding from the 25 x 80 Harvestore structure. Dr. Kreuser's observations of the conditions and health of the dairy cattle were consistent with what I had been told by Mr. Klehr.

4. I have reviewed the damages report prepared by Dr. Michael Behr and, to some extent, the DHIA records of Marvin Klehr.

5. I have made an extensive review of research and development reports generated by A. O. Smith Corporation and A. O. Smith Harvestore Products, Inc., the manufacturers of Harvestore structures, and inter and intra-office documents, memoranda, correspondence and reports of A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation regarding the qualities and performance of the Harvestore structures dating back to the early 1950's. In addition, I have reviewed printed brochures and films produced and distributed by the manufacture which contain representations of the manufacturer regarding the supposed quality and character of the Harvestore structures, particularly their supposed "oxygen-limiting" capability. Although Harvestore structures are now characterized as "oxygen-limiting", the explanation or definition applied to that characterization by the manufacturer is the same as the explanation of the "oxygen-free" characterization previously used by the manufacturer. Regardless of the characterization, Harvestores are represented as protecting the stored feed from the access of oxygen to the extent necessary to properly store and preserve feed.

6. It is my opinion, based upon my education, training, experience and knowledge of veterinary medicine, dairy science and nutrition, and my investigation of complaints of farmers using, storing and feeding from Harvestore structures, my review of research and development reports and inter and intra office documents, correspondence and reports regarding Harvestore structures and my review of Harvestore promotional materials, that Harvestore structures do not protect the stored feed from the access of oxygen and do not perform, store and preserve feed in the manner represented in their printed promotional materials and films

and that this failure to protect the feed from oxygen created a high probability of damage to the dairy animals, milk production and the dairy farming operation of Marvin Klehr.

The research and development reports and the inter and intra office memoranda and correspondence generated by A. O. Smith Harvestore products, Inc. and A. O. Smith Corporation, that A. O. Smith Harvestore products, Inc. and A. O. Smith Corporation demonstrate that they have known for years, and prior to the time of the sale of the structure to Mr. Klehr in 1974, that the Harvestore structure particularly larger diameter structures including the 25 foot diameter structures as sold to Mr. Klehr, did not prevent the access of oxygen to the stored feed and did not perform, store and preserve feed as represented and knew that these failures created a high probability of damage to users of Harvestore structures.

7. I am advised that Marvin Klehr was told by representatives of A. O. Smith Harvestore Products, Inc., or its dealer, and through promotional materials produced by A. O. Smith Harvestore Products, Inc., that the dark, molasses colored and smelling feed that he observed on occasions in the 25 x 80 Harvestore structure was the type of feed to be expected from a Harvestore structure and that it was good feed for his dairy animals. I have reviewed A. O. Smith Harvestore Products, Inc. the promotional material styled, "Do You Have A Nose For Good Feed?" (attached), which I am advised was received by Marvin Klehr. It represents that the molasses smelling feed is good, top quality superior feed for dairy cows. It is my opinion that any representations that warm, dark, molasses colored and/or smelling feed is desirable and good feed for dairy cows is not true. I am advised by Mr.

Klehr that it had been represented to him in printed promotional materials and films, and in statements made by the salesmen, that Harvestore feed would be and was expected to be warm to the touch and that this warm touch is desirable in preventing freezing and more pleasing for the cattle to eat. The warmth of the feed is due to the continued microbial activity in the feed due to exposure to oxygen. As stated, warm temperature and dark, molasses color or smell are characteristic of heating of the feed while in the Harvestore structure, is caused by access of the feed to oxygen, and makes the nutrients unavailable for use by the dairy cow. A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation's documents reveal their knowledge and awareness of the risk of heat damaged feed, the characteristics of heated feed and the effect feeding such feed has on cattle. I was further advised by Marvin Klehr that he was told by representatives of A. O. Smith Harvestore Products, Inc., or its dealer, over the years that he used the 25 x 80 Harvestore structure that whatever mold he saw coming from the Harvestore structure was a slight layer of mold between the various fillings of the Harvestore structure and was to be expected on occasion. He was told that that mold was not enough to adversely affect his cows. Research and development document and correspondence and memorandum of A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation reveal their knowledge and awareness of mold and secondary fermentation problems in the feed in the dome or cavity of the Harvestore structure. Such representations and statements that the mold comes from the layers between fillings of the structure and that warm molasses colored and smelling feed is desirable and good feed are not true and lead the farmer to a false sense-of security regarding the performance of the Harvestore structure and feed stored in it



and keep the farmer from knowing or learning the truth regarding the quality or condition of his feed and the performance of the Harvestore structure.

8. Many of the research and development reports prepared by A. O. Smith Harvestore Products, Inc. or A. O. Smith Corporation regarding the character and performance of the Harvestore structures show on their face that they are secret and confidential. I am familiar with research regarding feed storage and preservation which is made available in the field of veterinary medicine, dairy science and nutrition. I have contact with individuals in the field of veterinary medicine and dairy science on a regular basis, including those in the academic community as well as practitioners and farmers. The research and development reports prepared by A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation regarding the Harvestore structures and internal correspondence and memorandum which reflect the manufacturers knowledge regarding its product and its product failures have not been made available to those in academics, practitioners or farmers in the field of veterinary medicine and nutrition and animal science.

There are many reasons that one may experience production, health and/or reproductive problems on a dairy farm. These include, but certainly are not limited to: cattle disease, chronic or acute; farm management practices, including milking procedures, sanitation, and cattle management and care; reproductive management and practices, nutritive value of raised crops which may be effected by such things as weather, cropping practices and harvesting management practices; and nutrition, including proper ration and mineral balancing.

My investigation of the history of the Klehr dairy farm reveals that health and reproductive problems experienced on the Klehr dairy such as feet and leg problems, uterine infections, lengthened calving interval, cows off feed, displaced abomasum, and unthirty appearance, were in large part typical of the types of health and reproductive problems that occur on all dairy farms, except that the Klehr's' dairy farm experienced increased incidents of some such problems at various times. The problems which were excessive were scattered over a ten to fifteen year period of time, several of which did not manifest themselves until many years after the Klehrs began using the 25 x 80 Harvestore structure. My investigation of the history reveals no immediate outbreak of health or production problems immediately after the Klehrs began using the 20 x 80 Harvestore structure. -

Mr. Klehr's milk production did increase the first year or two after he began to use the 25 x 80 Harvestore structure at a rate more than otherwise would have been expected. Thereafter his milk production was periodically up and down the remainder of the time he used the 25 x 80 Harvestore structure. It is typical on any dairy farm that milk production experiences increases and decreases over the course of years and even within each year due to cyclical seasonal variations. On the whole, however, milk production historically has increased over time. Mr. Klehr, likewise, experienced periodic increases and decreases in production which he attributed at the time to various factors such as increase in herd size, participation in milk diversion program and three times a day milking. It is a review of Mr. Klehr's' milk production over the entire period of use of the Harvestore structure that reveals that Mr. Klehrs milk production did not progress over time relative to the rest of the dairy industry. Given the milk

production history of the Klehrs it is not unreasonable that Mr. Klehr, an individual farmer, would not discover the correlation between his milk production and his use of the 25 x 80 Harvestore structure.

My review of the history of the Klehr farm reveals that Mr. Klehr followed the reasonable steps, contacted the reasonably expected professionals, such as veterinarians and nutritionists, and made reasonable effort to address and determine the source of problems experienced on his farm. My review of the history of the Klehr dairy reveals no circumstance of production or animal health that necessarily would have or necessarily should have, put Mr. Klehr on notice that the 25 x 80 Harvestore structure or the feed stored in it was the source or cause of any of his problems. It would not have been unreasonable for Mr. Klehr's attention and other reasons for such problems and it would not have been unreasonable that he did not know or even suspect that the source of the problem was the Harvestore structure.

Dated this the 31st day of May, 1994.

/s/ William Olson  
WILLIAM OLSON

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No. 3:94-CV-424

MARVIN KLEHR and MARY KLEHR,

Plaintiffs,

vs.

A.O. SMITH HARVESTORE PRODUCTS, INC., and  
A.O. SMITH CORPORATION,

Defendants

AFFIDAVIT OF MARVIN KLEHR

Marvin Klehr, being first duly sworn, states and alleges as follows:

1. That he is one of the Plaintiffs in the above entitled cause, and has personal knowledge of the facts and circumstances recited herein.
2. On or about the 15th day of July, 1974, I entered into an agreement to purchase a 25 x 80 Harvestore feed storage structure. Before entering into this agreement, I was approached by Dick Deutsch, a salesman from MVBA Harvestore Systems, regarding the purchase of such a Harvestore structure.



3. Before entering into the agreement to buy the Harvestore structure, I received various pieces of printed literature and films produced by A. O. Smith Harvestore Products, Inc. which made representations regarding the character and quality of Harvestore structures. Mr. Deutsch also made representations regarding the quality and character of the Harvestore structures. Among the representations made to the Klehrs in the promotional materials and films and Mr. Deutsch were that the Harvestore structure: (1) was "oxygen-limiting" and would not permit oxygen to come into contact with the stored feed and that the structure, therefore, (2) would properly store and prevent spoilage of the feed; and (3) would produce better, more palatable and more digestible feed. Promotional materials and advertisements that I received prior to my decision to buy the Harvestore are set forth in Paragraph 10 of the Amended Complaint.

4. Mr. Deutsch told me and I was provided promotional material prior to my purchase of the structure, (accurate copy of one is attached as Exhibit 1) which stated that the feed would have a molasses color and smell. Mr. Deutsch and the advertisements told me that the feed would be, and was expected to be warm, and this would mean no freezing, and therefore, the cows would eat more of it. During the period I fed from the 25 x 80 Harvestore structure, the feed was brown, warm, of molasses color and smell. Although the feed was brown, warm, of molasses color and smell, that did not give me reason for concern or question because it was exactly what I was told and believed to expect.

I began feeding from the Harvestore structure in the summer of 1975. As I stated in my deposition, during the summer of 1976, during July or August, when we started

getting into new feed that was added to the silo that year, there was a few, but not many, chunks of little mold. That was the only thing that I ever saw in the feed that I had not been told to expect as normal. The feed otherwise appeared as I expected it to be. I asked Mr. Deutsch about the mold and he told me it was the top layer of the silo, that I would see a little bit of that between fillings of feed because of the air that is blown in during filling of the silo. Because I had seen top layers of spoilage in other types of feed storage, I understood and accepted his explanation. I saw mold again in the spring of 1977 in the last week or so before it went empty. I again asked Mr. Deutsch and he again explained it was the top layer of the silo coming out. The silo went empty about a week later. The next spring, I saw the same thing. For a short period on a few occasions during the year, I would see some slight mold then it would disappear again. Because there were usually at least three cuttings of feed per year filled into the silo, I assumed these were the layers between fillings as I had been told. I was told this mold would not affect or harm my cattle. Except for the incident in 1982, discussed below, the only time we threw any feed away from the Harvestore, was when we were emptying out the structure. When the structure was nearing empty, we would clean it out and haul one or two spreader loads of the feed out and spread it on the fields. Although we saw this small amount of molded feed each year at the end of the feed stack I always thought this was the top layer of the feed which had reached the bottom. The structure was 25 feet x 80 feet. One or two spreader loads from a structure that size is nothing more than cleaning the floor of the structure.

5. In 1982, the only time I had some increased spoilage from my Harvestore haylage unit, I immediately

contacted MVBA. MVBA promptly came to my farm, inspected the silo, and retorqued and resealed the silo. The Harvestore silo was then pressure tested, and a broken breather bag was found. The bag was replaced. I was advised at that time, by the repairmen, that my silo was "completely resealed". The complete resealing of the silo, as well as replacement of the breather bag, made me believe that any potential problem that I was having on my farm certainly could not come from the Harvestore silo. Attached as Exhibit 2 are the repair invoices from MVBA for retorquing, resealing the silo, and changing the breather bag in 1982.

6. I have been engaged in farming for all my life, and I know that cows can become sick, lose milk production, be culled from the herd, or die for many reasons unrelated to feed. In addition, the components of a dairy ration are numerous. During the fifteen or sixteen years that I fed from and used the 25 x 80 Harvestore structure, my dairy cows experienced unthrifty conditions, occasions of lower feed intake, feet and leg problems, lengthened calving interval, reduced conception rate, increased infections and periods when milk production was lower than I thought it should have been. However, these problems did not occur not all at the same time, but at various scattered times over a fifteen or sixteen year period. Many of the conditions did not start for many years after I started using the Harvestore structure. While, looking back, the increased incidence in these problems did occur after I began using the Harvestore structure, at the time of the occurrence they did not occur in a time sequence which caused me to link them in any way to the use of the Harvestore structure. We attempted to address and determine the source or cause of these problems as they occurred. Every time I had what I believed to be a problem with my dairy

cattle, I promptly investigated this with experts I had routinely relied upon over the years, such as veterinarians and feed sales representatives. Various recommendations were made to address each problem. At no time before 1991, did anyone suggest to me that feed from my Harvestore silo as causing me damage on my farm. I did not know or suspect that the 25 x 80 Harvestore structure as the source or cause of these problems. Even if I had known that feed from the Harvestore silo was causing me damage, I would never have concluded that the design of the Harvestore silo was defective. Instead, my normal procedure would have been to call MVBA, in order to make necessary repairs.

7. During the first two years that I fed from the Harvestore structure, milk production increased approximately 2,000 pounds per cow on a rolling herd average. I thought I was receiving the increased milk production that was represented to me at the time I acquired the structure. When milk production leveled off or decreased in the following years, I did not know nor suspect that there was any relationship with the Harvestore. At the time I thought the decrease in production or failure to increase was due to other causes such as increase in herd size, animal health and condition and/or participation in the dairy diversion program. No one ever indicated that there was any relationship between my lack of production and the Harvestore.

8. After I purchased the Harvestore silo, it was represented at meetings at MVBA in New Prague, as well as in the Harvestore Farmer magazine, and in discussion with Mr. Deutsch, that the only way bad feed could be produced in a Harvestore was because of either a leak in the silo that could be fixed (such as a broken breather bag), or through a



management problem on the part of the farmer, such as leaving a door opened.

9. Since 1974, and even before that time, we have been receiving the Harvestore Farmer/Harvestore System Farming magazine three to four times a year. This is in addition to the advertisements that I reviewed at the time of my deposition. Every issue of the Harvestore Farmer/Harvestore System Farming has at least one story containing a testimonial from a successful Harvestore farmer. These magazines came to me in the mail directly from A. O. Smith Harvestore Products, Inc. The magazines themselves contained numerous advertisements and educational articles, relative to Harvestore products. I also received additional promotional materials over the years after I bought the 25 x 80 Harvestore structure. In addition, over the same period I had a subscription to Hoard's Dairymen which regularly had promotions and advertisements for AOSHPI structures. Up until 1991, these magazine contributed to my belief that Harvestore silos were the Cadillac of silos, and that any problem I was having on my farm, with respect to milk production, was due to my own failure in management. The materials and advertisements which I saw and relied upon after I bought the 25 x 80 Harvestore are outlined in Paragraphs 15 and 16 of the Amended Complaint. In fact, I became so depressed in the late 1980's, about not being able to increase the profitability of my farming operation, that I sought medical advice.

10. My first suspicion, that I may have some problem with my Harvestore silo, came when I read an article in the Minneapolis paper about a jury verdict against Harvestore in the Kronebusch case, in February, 1991. I contacted the

University of Minnesota. Dr. William Olson, DVM, a nutritionist came to my farm. On Dr. Olson's visit to my farm in early April 1991, following my reading of the newspaper article in the Minnesota paper, I first looked into the cavity created inside the feed in the Harvestore structure by the operation of the bottom unloader. I observed various colors of mold covering the walls of the feed on the inside of the cavity. Approximately one week later I again looked inside the cavity of feed created by the bottom unloader and again saw various colors of mold on the feed.

11. Before April 1991, I did not know, nor did I suspect that I ever had bad feed coming from my Harvestore silo, with the exception of one occasion in 1982, and during the last week or two before the silo was empty each year. I always believed before 1991 that I was getting good feed from my Harvestore, and I truly felt, up until 1991, that the Harvestore was the "Cadillac" of silos. It was my firm belief, based upon what I had read in AOSHPI advertising, what I had been told by Mr. Deutsch, both before and after I purchased the 25 x 80 Harvestore structure, and continuing up until 1991, that good Harvestore feed was warm, had a brown, molasses color and smell, and that some mold in the last week or two of feed out before the silo was emptied was normal and to be expected.

In 1991, at the time Dr. Olson came to my farm, I saw large amounts of mold inside the Harvestore silo, and observed the "churning" action of the unloader on the feed, as it was being drawn out of the silo. I also observed the feed as it came out of the unloader door, and I then realized that the churning and mixing action of the unloader was causing this mold to "disappear", so that it could not be seen by the naked

eye. Only then did I realize that I had been feeding my cattle spoiled feed for many years.

12. Under no circumstances would I ever knowingly feed my dairy cows feed which I believed to be moldy, spoiled or rotten. I was completely shocked when I saw the inside of my Harvestore silo in April, 1991, and only then realized what I had been feeding my dairy cows all those years. Since I stopped feeding my cows from the Harvestore, the rolling herd average has increased over 6,000 pounds per cow.

Dated this the 1st day of June, 1994.

/s/ Marvin Klehr  
MARVIN KLEHR

(Attached Exhibits Omitted in Printing)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 95-1355

Marvin Klehr and Mary Klehr

vs.

A.O. Smith Corporation

A.O. Smith Harvester Products, Inc.

Dear Circuit Judges:

Mary and I are taking this last step in our Appeal in our own fashion. There will be no 50 pages of lawyer language. We know that you are very busy people, and at times not enough time in a day. We are farmers and put many hours in ourselves. If you could find a few minutes to read our Appeal through our eyes, and then be kind enough to answer it we will respect your decision.

In 1974 we purchased a 25 x 80 Harvester Silo with hopes of a much better source of feed storage for our cows. Production went up the first year, as expected, and slowly over time the problems started. We had depressed cattle, twisted stomachs, foot problems, swelling of the joints on hind legs, breeding problems and our production started a slow decline. We immediately consulted with our veterinarian that came to our farm on a regular basis; however, he was unable to give me an answer to our health problems. Several times a year feed samples were taken by our feed representative, but the samples never showed "Bad Feed". He would make up a ration that called for vitamins, minerals and protein. The



sample, never showed a sign of mold. We never seen mold or bad feed come out of the silo, except some small chunks of white mold a couple of times a year; which our Harvestore representative explained as a layer of mold you get between filling. This was due to a small amount of oxygen that was left in the silo when the door was closed after filling.

The silo had some disadvantages - there are no windows or doors for you to look inside through, you cannot go in and check the feed from the bottom as there is a big sign above the unloader door that reads, "Danger-Do Not Enter-Not Enough Oxygen to Support Life". The silo is 80 ft tall and dark blue in color. Looking down from the top through the small filler hole you cannot see any feed until it is 20 ft from the top. It was just plain dark with no access to the inside when feed was in storage. We had to rely on the salesman and his experience with the silo and also the representation by A.O. Smith that testing and experimenting had been done by them before we purchased the silo.

Richard Deutsch was the only salesman and Harvestore representative we had on the farm from the time before we purchased our silo up until we stopped using it in 1991; except for servicemen who were called to do service repair and routine check-ups. Mr. Deutsch came to the farm several times a year and asked how the cows were doing in production. We would walk back to the silo and run out feed. He would pick it up in his hands, smell it, picking around at the alfalfa stem, checking for length of cut. Mr. Deutsch never commented that I had "excellent feed". He always found something wrong with it, either the smell wasn't right, it was too long, it was too short, too dry or too wet. He said the smell came from not filling the silo fast enough or leaving

the feed exit door open too long. I knew that leaving the door open too long was not the problem, as we always closed the door as soon as the feed was out. Too short or too long, he would remind me to be sure to set my chopper knife at  $\frac{1}{4}$  to  $\frac{3}{8}$ " and to keep them sharp. Too wet or too dry, he reminded me to watch the moisture when chopping - it must be 35 to 55% moisture.

Every year I did my very best to do a better job of filling. Our feed always "looked good", but just not excellent. Every spring we would haul 2 or 3 manure spreaders full of feed to the field to be spread. Seventeen years went by and I felt I was not a good enough farmer to manage this silo.

Over the years our vet and feed experts seen my feed in front of the cows. Never did they detect bad feed. Samples of the feed were taken 3 or 4 times a year. The samples never showed that it was my feed that gave our herd health problems. We even vaccinated our cattle for various diseases and still no health improvement. I never once thought it was a problem with the silo - just bad management - I could not fill the silo fast enough.

In the fall of 1990 I had motor problems on the unloader. The serviceman was called and he came out to replace the motor. I helped him carry the motor to the feedroom. I told him that over the years I never got "excellent feed" from my silo, that maybe I couldn't fill it fast enough. He told me that my problem wasn't that I couldn't fill it fast enough - he said the problem was that I couldn't empty it fast enough! That was the first time in 17 years that I thought that maybe it wasn't by management.

In the spring of 1991, I seen an article in the Star & Tribune about a farmer from Rochester, Mn who had gone to court against the Harvester silo company. In that paper it described the problems he had had with his own dairy cows. Mary described it this way when she read the article, "put our name in place of his and you just described our past 17 years of herd health, family stress and financial disaster". The article described all the same herd health problems, foot problems, breeding problems, depressed cattle and low production, thin cows and high somatic cell count.

After several days of reading the article over and over and with many discussions about this between Mary and I, we finally decided to contact the U of M Veterinary Clinic. That is how we met Dr. Bill Olson. After a lengthy phone conversation, Dr. Olson decided to come out to the farm. On his first visit we showed him the cattle, looked at our production records and then the feed we were feeding. The haylage came out of the silo looking like it did all these years

Dr. Olson took feed samples and we set up a date that he would be back. On the morning of his second visit I was told to remove the small door above the unloader and chop a hole through the haylage till I get to the center of the cavity. It took me several hours to do. The feed I was chopping was excellent haylage. When I got to the cavity I used a flashlight to shine inside on the tunnel. I could see the cavity, but that was all. Dr. Olson came and we both tried to see in the cavity. I removed more haylage from the tunnel to make the opening larger. We fastened a spotlight to a long wooden board and slid it into the tunnel. At that time we could see some chunks of mold hanging from the cavity, but still not a clear view of

the cavity. Dr. Olson decided to close the door and said he'd be back in a few days with a camera.

A few days later Dr. Olson returned bringing two of his students with him along with a video camera and small T.V. We mounted the video camera on a long board and slowly slid the camera into the tunnel. After sometime of trying, we were able to get the camera into the cavity. With a spotlight mounted next to the camera and with the small T.V. hooked up to the camera, we were able to view the full cavity. I couldn't believe what I was seeing - it was the most hideous sight I'd ever seen!! There was mold hanging all over the top of the cavity - every color under the sun. There was chunks of mold everywhere. The chain type of unloader that the Harvester silo has was started mixing my excellent haylage from the outside wall of the silo with the junk and mold in the cavity. It came out all mixed-up with no signs of the junk feed. Liken this to a jar of jelly with mold in the jar, once you stir it up the mold is mixed, you no longer see it, yet you still would be eating it. Think what that would do to you if you ate that day after day. At that moment I realized that I had been poisoning my cattle all of those years. This was the first time I was ever able to look into the cavity of the silo. Remember, the silo has no windows and a sign that reads "Danger-Do Not Enter-Not Enough Oxygen to Support Life". From the top of the silo, through the small filler hole, you do not see the cavity. The silo is dark inside and the cavity is hidden under the feed.

The door that was removed above the unloader so I could chop that tunnel is small and only used by the servicemen to fix the unloader. There is 500 to 600 tons of feed above that door - no way can a man crawl into the silo to see the cavity.



The serviceman was right - there was no way I could empty the silo fast enough to stay ahead of the mold!

Mr. Deutsch, the salesman, had me looking the other direction; I fill too slow, I chop too fine, I chop too long, I chop too wet or I chop too dry. He knew the cavity was my problem all along, even though he told me it was my management. He told me I was the only farmer that had had any problems. That day the decision was made to never use that silo again!!

On Monday, June 24, 1991 at 1:00 P.M., Mr. Richard Deutsch lied to me for the last time. He came to our farm for his annual visit. We sat down on the step by our garage and I told him of the recent problems on the farm, and of Dr. Olson coming to the farm and the discovery of mold in the silo cavity. Mr. Deutsch got very made (sic) when he heard we had filed a lawsuit against A.O Smith Corporation. He told me that the problems were all management. He told me that I was not filling the silo fast enough and that farmer John down the road, who had two grown sons and 3 hired men, big equipment, big tractors, fills his silo very fast and always has good feed. I said "Mr. Deutsch - you are wrong! Dr. Olson, from the U of M had told me that he had previously visited farmer John and that John was dissatisfied with the feed coming out of his silo. He had always had problems with warm feed coming out, as well as health problems with his cows". Mr. Deutsch looked at me and said, "he did?" With that he turned and walked away and left in his car.

That evening I called farmer John and asked him if he knew a Dr. Bill Olson. He said "yes" that Dr. Olson had been to his farm several times. John's feed nutritionist had called him to

the farm because of health problems with his cows and hot feed coming out of the silo. I asked him how long he'd been having these problems and he said, "many years". I then proceeded to ask him a few more questions regarding this:

Q. "Did Harvester say what was causing the warm feed"?

A. "They said it was taking too long to get the feed out through the unloader door of the silo".

Q. "Who said that?"

A. "The Harvester salesman".

Q. "What did he say you needed to do?"

A. "I needed the new "Super Giant Unloader" with more hooks so I can get the feed out faster".

Q. "What was the cost for that unloader"?

A. "Over \$35,000".

Q. "Has it helped in the quality of the feed"?

A. "No"!!

That was the end of our conversation. Several years later, farmer John changed the design of the silo by putting an unloader on top of the silo. I don't dispute farmer John filled the silo faster than I did, as he has a very large farming operation. Mr. Deutsch knew on June 24, 1991, that farmer

John had had problems and that I wasn't the only farmer out there having these problems.

Two years after shutting down my silo, the State Holstein Association of Minnesota awarded our family two awards for having two cows that achieved the highest milk award in the state of Minnesota.

We always knew we had the ability and genetics to get big production; but we just did not have the "excellent feed" we needed.

Over the years I accepted the fact that I may have bought a silo that was too big and that I could not manage it right or fill it fast enough. Never once did I connect it the health problems in the cattle with the feed in the silo.

After viewing the video, it appears in "my estimation" that 95% of the good/excellent feed was mixing with 5% of the junk and mold. With the mixing from the unloader it made it "impossible" for the naked eye to detect the junk and mold. Feed samples never detected this either; however, the health of our cattle did. I've always loved my cattle and would never do them harm. Shutting down that silo in 1991 was the easiest decision I've ever made!

All the facts in this report are true and can be found in my depositions. The video tape and Dr. Bill Olson's report is evidence in this lawsuit.

Thank you,

P.S. Please rush, as my family has waited a life time for this decision.

Marvin & Mary Klehr  
18551 Redwing Trl.  
Shakopee, MN 55379

(Signatures Omitted in Printing)

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